Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

PENN ADVERTISING OF BALTIMORE, INC.,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A Municipal Corporation; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the court of appeals upheld a Baltimore ordinance that bans cigarette advertising on certain outdoor signs. After this Court vacated the decision for reconsideration in light of *44 Liquormart* v. *Rhode Island*, 116 S. Ct. 1495 (1996), the court of appeals reinstated its original judgment. The questions presented are:

1. Whether a restriction on truthful, non-misleading commercial speech may be upheld where the reviewing court asked only whether the legislature could have found a "logical nexus" between the restriction's means and ends, and made no independent inquiry into whether the restriction either would in fact materially advance its goals or was narrowly tailored to do so.

2. Whether an ordinance that bans cigarette advertising on billboards escapes preemption under the Federal Cigarette Labeling and Advertising Act because the ordinance does not purport to dictate the content of cigarette advertisements.

RULE 29.6 STATEMENT

The parties to the proceeding in the court below are named in the caption. Petitioner Penn Advertising of Baltimore, Inc. is a Delaware corporation. Its parent company is Penn Advertising, Inc. Penn has no non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is reported at 101 F.3d 332. That court's initial opinion (App., *infra*, 3a-14a) is reported at 63 F.3d 1318. The opinion of the district court (App., *infra*, 15a-47a) is reported at 862 F. Supp. 1402.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1996, and a timely petition for rehearing was denied on December 11, 1996. App., *infra*, 82a-83a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press."

Section 5(b) of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), provides: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

STATEMENT

This case involves a challenge, under the First Amendment and on federal preemption grounds, to an ordinance ("Ordinance 307" or "the ordinance") of the City of Baltimore, Maryland ("the City"), that bans cigarette advertising on certain outdoor signs. Last Term, this Court vacated the Fourth Circuit's decision upholding the ordinance and remanded the case for reconsideration in light of *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495 (1996). On remand, however, a divided panel of the court of appeals disregarded the manifest import of *44 Liquormart* and reinstated its original judgment. That judgment cannot be reconciled with this Court's decisions and should be set aside.

1. The ordinance at issue in this case prohibits signs or "other form[s] of advertising that advertise[ ] cigarettes in a publicly visible location," and defines "publicly visible location" to include "outdoor billboards, sides of building[s], and free standing

signboards." Baltimore City Code, art. 30 (zoning), § 10.0-1(I) (App., *infra*, 89a). At the same time, the ordinance creates significant exceptions to this restriction, permitting cigarette advertisements (1) on buses and taxicabs, and on commercial vehicles used to transport cigarettes; (2) at locations licensed to sell cigarettes, which allows many signs and display advertisements in and on the outside of numerous stores; and (3) at professional sports stadiums.[1] *Id.* at 89a-91a; see also *id.* at 93a-96a (later ordinance broadening exemption for signs on stores that sell cigarettes).

The stated purpose for the City's enactment of the ordinance was to "reduce the illegal consumption of cigarettes by minors." App., *infra*, 4a. In adopting the ordinance, the Baltimore City Council cited studies it characterized as suggesting that advertising may stimulate the consumption of cigarettes by minors, that cigarettes commonly are used by minors, and that use of cigarettes may lead to the abuse of hard drugs. See *id.* at 5a-6a. The Council did not, however, receive or rely upon any evidence indicating that Ordinance 307's particular restriction on a limited category of outdoor advertising would have *any* effect, let alone a material one, on the use of cigarettes by minors.

Petitioner Penn Advertising of Baltimore, Inc. ("Penn") is engaged in the business of displaying commercial and public service messages on outdoor signs located throughout Baltimore. Penn leases property from private owners for its signs, erects and maintains the signs, and makes its signs available to advertisers who wish to display their messages in the City. Penn's customers include companies that advertise cigarettes. It is not disputed that the commercial messages displayed by Penn are truthful, non-misleading, and concern lawful activity.

Penn brought this challenge seeking a judgment that Ordinance 307 is both inconsistent with the First Amendment to the United States Constitution and preempted by federal law. Penn's First Amendment argument maintained that the ordinance failed the four-part test set out in *Central Hudson Gas & Electric Corp.* v. *Public*

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[1] In addition, the ban exempts certain billboards, including those along interstate highways and in certain areas that are zoned for industrial or other specified business use.

Service Comm'n, 447 U.S. 557, 566 (1980), to govern the regulation of commercial speech:

> [1] For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading. [2] Next, [the Court] ask[s] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [the Court] must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Penn's statutory argument contended that the ordinance is preempted by Section 5(b) of the Cigarette Labeling and Advertising Act ("the Act"), which provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of * * * cigarettes." 15 U.S.C. § 1334(b).

The district court upheld the ordinance. App., *infra*, 15a-47a. In rejecting Penn's First Amendment challenge, the court limited Penn's ability to engage in discovery (see *id.* at 6a) and did not require Baltimore to demonstrate that the ordinance would in fact advance the asserted state interest. Instead, disregarding the evidence submitted by Penn to show that the ordinance would *not* advance its stated purpose, the court relied upon *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), to find that the ordinance satisfies the third prong of the *Central Hudson* test because courts may "defer to a legislative judgment that advertising increases consumption." App., *infra*, 21a. The court also found that the ordinance satisfies the fourth prong of the *Central Hudson* test; the court deemed it unnecessary to determine whether less burdensome means of reducing the purchase and consumption of cigarettes by minors (such as increased enforcement of existing prohibitions) would be feasible or effective, concluding that the availability of such alternatives does not establish a lack of narrow tailoring. *Id.* at 30a-32a. The court went on to reject Penn's preemption argument, finding that the ordinance is not a restriction "based on smoking and health" because it was intended to effectuate a state law that prohibits the sale of cigarettes to minors. *Id.* at 36a-37a.

2. The court of appeals affirmed. App., *infra*, 3a-14a. Turning first to the preemption question, the court acknowledged that, according to the plain terms of the Act, a state law or municipal ordinance "based on smoking and health" must be set aside. The court nevertheless rejected the claim of preemption, finding it crucial that "Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements." *Id.* at 11a (emphasis in original). The court added that "the ordinance does not limit the ability of cigarette manufacturers to advertise generally in the media." As a consequence, even though the City conceded at oral argument (C.A. Arg. 23) that the restriction on advertising was designed to advance public health goals, the panel concluded that the ordinance "neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health*." App., *infra*, 11a (emphasis in original).[2]

The court of appeals also rejected Penn's First Amendment argument. Focusing on the third and fourth prongs of the *Central Hudson* inquiry, the court relied on *Posadas* to hold that when the government defends a restriction on commercial speech it need not "'prove conclusively that [a] correlation [between the regulation and the governmental interest] in fact exists'"; instead, "'[t]he proper standard for approval must involve an assessment of reasonableness of the legislature's belief that the means it selected will advance its ends.'" App., *infra*, 13a, quoting *Anheuser-Busch, Inc.* v. *Schmoke*, 63 F.3d 1305, 1314 (4th Cir. 1995) ("*Anheuser-Busch I*") (reprinted at App., *infra*, 60a-81a), vacated, 116 S. Ct.

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[2] The court of appeals did not accept the argument advanced in the City's brief that the ordinance was not based on health considerations because its drafters identified as its purpose the facilitation of compliance with a state law (which itself was based on health concerns) that precludes the sale of cigarettes to minors. To the contrary, the court acknowledged in its discussion of the First Amendment that the policy underlying the ordinance rested on "the current public concern over the dangers of cigarette consumption by minors." App., *infra*, 12a. Indeed, the ordinance's preamble itself adverts to health concerns, and the debate leading to adoption of the ordinance was replete with references to the connection between smoking and health. See, *e.g.*, Ct. App. J.A. 461-463, 687, 690.

1821 (1996) .[3] And while the court acknowledged that a restriction on commercial speech must be narrowly tailored, it concluded that the City need not "'abandon altogether an approach that directly advances its goal.'" *Id.* at 13a-14a, quoting *Anheuser-Busch I*, 63 F.3d at 1316.

Applying these standards here, the court of appeals upheld Ordinance 307. In doing so, the court made no attempt to determine whether the particular advertising restriction imposed by the ordinance would in fact have any effect on the use of cigarettes by minors, and it made no reference to the evidence offered by Penn to establish that advertising does not induce minors to smoke. Instead, noting its observation in the companion *Anheuser-Busch I* case that certain studies had "linked alcohol advertising to underage drinking," the court found a "'logical nexus'" between the City's goal and the ordinance's partial ban on cigarette advertisements. App., *infra*, 13a (citation omitted). Similarly, the court found it unnecessary to address Penn's argument that the advertising ban was not narrowly tailored because it restricted only a limited subset of the advertising signs to which minors are exposed in the City, or because the City failed to consider alternative means of achieving its goal that did not limit speech (such as educational efforts or enhanced enforcement of laws barring the sale of cigarettes to minors). Instead, again by reference to its holding in *Anheuser-Busch I*, the court simply observed that the fourth prong of *Central Hudson* was satisfied because there was no "'less restrictive means of screening outdoor advertising from minors.'" *Ibid.*, quoting *Anheuser-Busch I*, 63 F.3d at 1316.

3. This Court then vacated the court of appeals' decision and remanded the case for further consideration in light of the intervening decision in *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495 (1996), which held that Rhode Island's ban on liquor price advertising violated the First Amendment. *Penn Advertising of Baltimore, Inc.* v. *Mayor and City Council of Baltimore City*, 116

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[3] The decision in *Anheuser-Busch*, upon which the court of appeals relied in this case, rejected a First Amendment challenge to a Baltimore ordinance that precludes alcohol beverage advertising on essentially the same set of signs as is involved here. The opinions in *Anheuser-Busch* are reproduced at App., *infra*, 48a-81a.

S. Ct. 1821 (1996). On remand, however, a divided panel of the court of appeals "affirm[ed] the district court's judgment for the reasons previously given and readopt[ed] [its] previous decision," as slightly modified by its opinion in the companion case of *Anheuser-Busch, Inc.* v. *Schmoke*, 101 F.3d 325, 1996 U.S. App. LEXIS 29460 (4th Cir. Nov. 13, 1996) ("*Anheuser-Busch II*"). App., *infra*, 2a.[4]

Although the panel majority recognized that *44 Liquormart* had disapproved *Posadas* (see *Anheuser-Busch II*, at *3, App., *infra*, 49a-50a n.*), the court nevertheless did not allow for the development of a factual record, did not require Baltimore to demonstrate that the ordinance satisfied the third and fourth prongs of *Central Hudson*, and did not revisit the question whether the ordinance in fact either advanced its stated purposes to a material degree or was narrowly tailored to do so. Instead, the court read *44 Liquormart* as standing only for the narrow proposition "that keeping legal users of alcoholic beverages ignorant of prices through a blanket ban on price advertising does not further any legitimate end." *Anheuser-Busch II*, at *9 (App., *infra*, 53a). From that perspective, the court held *44 Liquormart* irrelevant here for three reasons.

First, the court noted that "Baltimore does not ban outdoor advertising of [tobacco] outright but merely restricts the time, place, and manner of such advertisements." *Anheuser-Busch II*, at *9-*10 (App., *infra*, 53a). Second, the majority declared that "in Baltimore City's case, neither the state nor the city is attempting to undermine democratic processes and circumvent public scrutiny by substituting a ban on advertising for a ban on the product, as the *44 Liquormart* Court feared was the case with Rhode Island" (*id.*at 10); the court of appeals observed that the use of tobacco by minors "has been already banned directly and forthrightly through legislation." *Ibid.* (App., *infra*, 53a-54a). And third, the court opined that "Baltimore's ordinance attempts to protect its children

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[4] The Fourth Circuit's decision in *Anheuser-Busch I* also was vacated by this Court and remanded for reconsideration in light of *44 Liquormart*. On the same day that it issued its revised opinion in this case, the court of appeals in *Anheuser-Busch II* reaffirmed its initial decision.

in a manner and with a motive distinct from those evidenced by Rhode Island in *44 Liquormart*." *Id.* at *13 (App., *infra*, 53a).

Judge Butzner dissented. App., *infra*, 2a, 55a-59a. He noted that *44 Liquormart* emphasized the need for an independent judicial determination whether the third and fourth prongs of *Central Hudson* are satisfied, explaining that

> [t]he independent evaluation that is now required is not possible in the absence of a factual record. * * * [S]peculation about what might be is not enough to resolve issues of First Amendment coverage that must ultimately turn on factual findings. In order to meet its burden under [the third prong of] *Central Hudson*, the city must show "not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'" *44 Liquormart*, 116 S. Ct. at 1509 [opinion of Stevens, J.]. Even assuming, as common sense might suggest, that Baltimore's restrictions will reduce underage [smoking] to some degree, without any findings of fact we cannot determine whether the effect will be significant. * * * Accordingly, each party should be given the opportunity to present evidence on this issue and to test the strength of the opposing party's evidence.

Anheuser-Busch II, at *19-*20 (App., *infra*, 58a). Judge Butzner likewise noted that the ordinance could not be found to have a close fit under the fourth prong of *Central Hudson* without a factual determination whether "the city could implement other measures that would reduce underage [smoking] as effectively as the advertising restrictions without regulating speech." *Id.* at *20 (App., *infra*, 58a).

Judge Butzner concluded that "[a] charge that advertising restrictions infringe rights guaranteed by the First Amendment requires careful evaluation assessing the credibility of witnesses and weighing the evidence. These functions should be performed by a judge — not by a city council." *Anheuser-Busch II*, at *21 (App., *infra*, 59a). He therefore warned that, "[b]y affirming the district court's judgment without adducing and examining the facts, a reviewing court engages in the type of deferential review that *44 Liquormart* deems improper." *Ibid.* (App., *infra*, 59a).

REASONS FOR GRANTING THE PETITION

The decision below presents constitutional and statutory issues of substantial importance — and constitutes an extraordinary departure from the directions issued by this Court. The opinions in *44 Liquormart* forcefully affirmed that a regulation of commercial speech will be upheld only if it will in fact materially advance the state's goals and is narrowly tailored to do so. But the court of appeals expressly eschewed that sort of close review of the ordinance, endorsing instead a regime that essentially abdicates judicial responsibility in the area of commercial expression and defers almost completely to any legislative judgment that is not manifestly irrational on the face of the legislative record. The Fourth Circuit thus utilized what Judge Butzner properly characterized as the very "type of deferential review that *44 Liquormart* deems improper." *Anheuser Busch II*, at *21 (App., *infra*, 59a). At a time when governments at all levels are attempting with increasing frequency to restrict commercial speech that addresses disfavored products or services, the question whether this abdication of judicial responsibility is proper — and whether this sort of broad suppression of constitutionally protected expression should be tolerated — involves a recurring issue that is of great importance to manufacturers and retailers, to consumers, and to states and municipalities across the Nation.[5]

At the same time, the court of appeals' holding on preemption significantly undermines an important provision of the Federal Cigarette Labeling and Advertising Act, scuttling a carefully crafted legislative compromise between proponents and opponents of restrictions on cigarette advertising. This, too, involves a matter of great practical significance. Restrictions on cigarette advertising have been enacted or are being considered by many state and local

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[5] In addition, the Court has explained that the "intermediate scrutiny" applied in commercial speech cases also is used to assess content-neutral regulations of non-commercial speech. See *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2469 (1994) (plurality opinion); *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705 (1993); *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987). The approach adopted by the Fourth Circuit therefore has implications for a very broad range of expressive activity.

governments.[6] Against this background, the decision below is sure to have a significant impact in shaping these legislative initiatives throughout the United States. Because that decision is deeply flawed, is inconsistent with the holdings of this Court, and creates a conflict among the courts of appeals, further review is imperative.

I. THE ORDINANCE CANNOT SURVIVE SCRUTINY UNDER THE FIRST AMENDMENT

A. The Court Of Appeals' Deferential Review Cannot Be Reconciled With *44 Liquormart* And This Court's Other Commercial Speech Decisions

The court of appeals' approach to the First Amendment quite plainly cannot be reconciled with this Court's decisions. The Fourth Circuit held in its initial opinion (and reaffirmed on remand from this Court) that, "'[i]f it appears to the [reviewing] court that the legislative body *could reasonably have believed* * * * that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met.'" *Anheuser-Busch I*, 63 F.3d at 1311 (App., *infra*, 68a) (emphasis added). The court below therefore held that a reviewing court must find only

> "a logical nexus between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclu-

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[6] In December 1996, the board of health of Tacoma-Pierce County, Washington, adopted a regulation providing that outdoor advertising may appear only in "tombstone" format, and is wholly prohibited in certain areas. In 1994, Preston, Minnesota passed an ordinance banning most tobacco advertising in retail stores. Also in 1994, two local boards of health in Massachusetts adopted regulations banning all outdoor tobacco advertising and most tobacco advertising in retail stores. In addition, several public transit authorities have banned tobacco advertising on their facilities — *e.g.*, San Diego, California (1994) and Albany, New York (1993). A few cities have ended tobacco advertising on city-owned property — *e.g.*, San Francisco, California (1992) and New York, New York (1992). Utah banned tobacco advertising on billboards in 1921 as part of a broader Prohibition-era statute prohibiting the sale of cigarettes altogether (the sales ban was repealed in 1923). Bans on outdoor advertising of tobacco products have been proposed in Atlanta, Cleveland, Memphis, Pittsburgh, and San Francisco.

> sively that the correlation in fact exists, or that the steps undertaken will solve the problem. * * * The proper standard for approval must involve an assessment of the *reasonableness of the legislature's belief* that the means it selected will advance its ends."

Id. at 13a (emphasis added), quoting *Anheuser-Busch I*, 63 F.3d at 1314-1315.[7] Thus, under the court of appeals' approach, while a party challenging a restriction on commercial speech may show that "the legislature acted *irrationally*, it cannot subject legislative findings themselves to judicial review under a clearly erroneous standard or otherwise. To do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other." *Anheuser-Busch I*, 63 F.3d at 1312 (App., *infra*, 69a) (emphasis added).[8]

This deferential approach is flatly inconsistent with the Court's modern commercial speech decisions — including, most notably, *44 Liquormart* itself. Even prior to *44 Liquormart*, this Court had not countenanced the limited judicial scrutiny of restrictions on

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[7] While the Fourth Circuit stated in its opinion on remand that its initial decision *had* engaged in an "independent assessment" of the efficacy of the ordinance (*Anheuser-Busch II*, at *4 (App., *infra*, 50a); see *id.* at *3 n.* (App., *infra*, 49a-50a n.*)), that comment illustrates the court of appeals' misunderstanding of the controlling standard. As support for its assertion that it engaged in an "independent" review, the court cited the portion of its initial opinion holding that "[t]he proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends." *Anheuser-Busch I*, 63 F.3d at 1314-1315 (App., *infra*, 74a), cited at *Anheuser-Busch II*, at *4 (App., *infra*, 50a). The court thus made an "independent" determination whether the *legislature* could reasonably have found that the ordinance would be effective; the court did not look to the record to itself determine whether the ordinance would *in fact* advance its stated goals, or was narrowly tailored to do so.

[8] The court of appeals elaborated on this conclusion in *Anheuser-Busch I*, explaining that a legislature's conclusions about the effect of its enactment "are 'legislative facts,' the substance of which cannot be trumped by the fact finding apparatus of a single court." 63 F.3d at 1312 (App., *infra*, 69a).

commercial speech espoused by the court of appeals. Because such restrictions "threaten[ ] societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard" (*Edenfield* v. *Fane*, 507 U.S. 761, 766 (1993)), "[t]he state's burden [in defending such a restriction] is not slight; the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the cost of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'" *Ibanez* v. *Florida Dept. of Business and Professional Regulation*, 114 S. Ct. 2084, 2089 (1994) (citation omitted). The Court explained that this burden "'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' * * * This requirement [is] critical * * *." *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995) (citation omitted). And the Court made clear that the requirement that the restriction on speech "will in fact" alleviate the targeted harms obligates courts to look not only to the legislative record, but also to evidence presented in the judicial proceeding relating to the actual and anticipated operation of the restriction. See *Coors*, 115 S. Ct. at 1593; *Florida Bar* v. *Went For It, Inc.*, 115 S. Ct. 2371, 2375-2376 (1995); *Ibanez*, 114 S. Ct. at 2090 & n.10; *Edenfield*, 507 U.S. at 770-773; *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 95-96 & n.10 (1977).

That requirement was forcefully reaffirmed in *44 Liquormart*. There, Justice Stevens, writing for four Justices (himself and Justices Kennedy, Souter, and Ginsburg), emphasized that "the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree'" (116 S. Ct. at 1509 (citation omitted)); he added that the state must show the ineffectiveness of "alternative forms of regulation that would not involve any restriction on speech." *Id.* at 1510. Justice O'Connor, likewise writing for four Justices (herself, the Chief Justice, and Justices Souter and Breyer), agreed with Justice Stevens that courts are obligated to "examine[] carefully the relationship between the asserted goal and the speech restriction used to reach that goal." *Id.* at 1522. Justice Thomas,

meanwhile, read the opinions of Justices Stevens and O'Connor "to commit the courts to striking down restrictions on speech whenever a direct regulation (*i.e.*, a regulation involving no restriction on speech * * *)" would be equally effective. *Id.* at 1519. The court of appeals' approach cannot be reconciled with any of these principles.

The Fourth Circuit's departure from this Court's approach can be clearly seen in its treatment of *Posadas*. In its initial opinion, the court relied principally on *Posadas* for the proposition that the "reasonable[ness]" of the legislature's judgment is controlling and that the government need show only that a "logical correlation existed between the legislative objective and the means selected to achieve that objective." *Anheuser-Busch I*, 63 F.3d at 1314 (App., *infra*, 74a); see *id.* at 1316 (App., *infra*, 77a). But in *44 Liquormart*, the opinions of Justices Stevens and O'Connor both expressly disapproved the analysis of *Posadas*. As Justice O'Connor explained, "[s]ince *Posadas*, * * * this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny." 116 S. Ct. at 1522 (O'Connor, J., concurring in the judgment). See *id.* at 1511 (opinion of Stevens, J.) ("*Posadas* clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy"); *id.* at 1513 ("As the entire Court apparently now agrees, the statements in the *Posadas* opinion on which Rhode Island relies are no longer persuasive."). While the Fourth Circuit acknowledged in its opinion on remand that this Court had disapproved *Posadas*, it nevertheless reinstated its judgment without changing its analysis in

any material respect.[9] That plainly did not constitute the meaningful reconsideration mandated by this Court.

B. The Court Of Appeals Misapplied The Third And Fourth Prongs Of The *Central Hudson* Test

The court of appeals' misunderstanding of intermediate First Amendment scrutiny necessarily tainted its application of the third and fourth prongs of the *Central Hudson* test. The decision below thus stands as a clear illustration of the dangers of excessively deferential judicial review of restrictions on commercial speech.

1. Justice Stevens explained in *44 Liquormart* that, under the Court's repeated interpretations of the third prong of *Central Hudson*, courts must determine whether the State has shown "not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'" 116 S. Ct. at 1509, quoting *Edenfield* v. *Fane*, 507 U.S. 761, 771 (1993). In the absence of record evidence establishing that point, he concluded that upholding the Rhode Island regulation "would require [the Court] to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest." *Id.* at 1510, quoting *Edenfield*, 507 U.S. at 770. A majority of the Court embraced that principle in *44 Liquormart*. Justice O'Connor, while assuming *arguendo* that Rhode Island's law did advance the governmental interest (see *id.* at 1521), nevertheless expressly endorsed the importance of a "searching[]" examination of "the State's

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[9] The court of appeals also misunderstood the import of this Court's decision in *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418 (1993). The court of appeals had cited *Edge* for the proposition that it is enough for "a logical correlation [to] exist[] between the legislative objective and the means selected to achieve that objective." *Anheuser-Busch I*, 63 F.3d at 1314 (App., *infra*, 73a). But this Court in *44 Liquormart* explained *Edge* very differently: as Justice Stevens put it, the statute at issue in *Edge* "was designed to regulate advertising about an activity that had been deemed illegal in the jurisdiction in which the broadcaster was located." 116 S. Ct. at 1511. That holding plainly has no application in this case, where the targeted speech concerns an activity that has not been "deemed illegal" in the jurisdiction that has imposed the advertising restriction. *Ibid.*

professed goal," explaining that *Central Hudson* "require[s] the State to *show* that the speech restriction directly advances its interest." *Id.* at 1522 (emphasis added).

The court of appeals, however, simply ignored the requirement that courts independently determine whether the government has satisfied its burden of proof. And by denying Penn meaningful judicial review, the court of appeals endorsed an approach that led (and in the future will lead) to the validation of restrictions on speech that manifestly do not in fact serve any proper purpose. Here, the record provides no basis for concluding that the ordinance will have the slightest impact on underage smoking, let alone that it will directly and materially advance the goal of reducing such activity. To be sure, the court of appeals cited studies characterized by the City Council as suggesting that there is a link between advertising *in general* and demand for cigarettes. See App., *infra*, 5a-6a. That proposition was itself hotly disputed before the City Council. See, *e.g.*, Ct. App. J.A. 694. More particularly, and more to the point here, speakers at the City Council's hearing on the ordinance noted that even the studies identified by the ordinance's supporters could not justify the speech restriction because they say nothing about the effect that *billboard* advertising has on smoking by *minors*. *E.g.*, Ct. App. J.A. 694, 703.[10]

Moreover, in contrast to the City's failure to offer evidence to the courts below, beyond the thin legislative record, to justify the ordinance under the *Central Hudson* test, Penn provided studies and affidavit evidence demonstrating that reducing advertising would have no effect on smoking — either in the general population or

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[10] There is absolutely *no* evidence in the record (or anywhere else, so far as we are aware) that the billboard advertising barred by the ordinance increases smoking by any segment of the public, let alone minors. For example, one of the studies relied upon by the City addressed only advertisements found in newspapers and magazines, which are not affected by the ordinance. Ct. App. J.A. 858-859. Another considered students' perceptions of specific advertisements, but did not conclude that a ban on advertising would reduce adolescent smoking rates. *Id.* at 866-868.

among minors. Ct. App. J.A. 1030-1117 (studies and reports).[11] Without making *any* attempt to look behind this conflicting evidence regarding the effect of advertising on overall demand for cigarettes, it was impossible for the court below to find that the ordinance "will in fact" achieve its goals.

In addition, even if the City's speculation (that reducing the number of cigarette advertising signs will reduce smoking by minors) were well-founded, any benefit from the ordinance would still depend on the conclusion that the ordinance will in fact materially reduce the number of such advertisements. But the record suggests that the ban will not accomplish even this goal; the City has entirely failed to show that the ordinance will produce *any* net reduction in the quantity of cigarette advertising to which youths are exposed, since cigarette manufacturers presumably could move their advertising from billboards to other media that also incidentally reach children. See Ct. App. J.A. 1121-1124. Indeed, the unrefuted evidence demonstrates that the primary effect of the ordinance's discrimination would be simply to impose economic punishment on billboard owners, such as Penn, and to benefit other advertising media, such as on-site locations, taxis and buses, and newspapers. *Id.* at 1121-1122, 1124-1125.

Similarly, even if it is assumed that the ordinance will lead to a small reduction in the number of cigarette advertisements in the City, that reduction plainly could not be material. There is no evidence at all that a ban on billboard advertising for cigarettes could reduce demand when, as here, the municipality *permits* many cigarette advertisements elsewhere, including some (such as those on the exterior walls of retail establishments, at sports stadiums, and on buses) that are sure to be seen repeatedly (if incidentally) by

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[11] The 1987 Economic Report of the President, for example, concluded that cigarette advertisements serve principally to increase the advertiser's market share rather than overall demand for the product. J.A. 992, 1030-1035. See also *id.* at 1048 (study of advertising bans in other countries shows no impact on smoking rates); *id.* at 1073 (study finds no evidence to believe advertising bans curtail tobacco consumption generally or reduce new smoking among minors); *id.* at 1109 (study finds no reason to believe advertising ban will reduce the number of children who begin smoking).

minors. J.A. 1122-124, 1127-1147. While there is no record evidence establishing how many retailers and others display cigarette advertising in the City, it is certain that, in a city of Baltimore's size, there are *thousands* of locations at which cigarette advertising remains permissible. In these circumstances, the City's position is identical to that rejected by this Court in *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993), where Cincinnati's attempt to serve safety and esthetic interests by banning certain newsracks was invalidated because it had "only a minimal impact on the overall number of newsracks on the city's sidewalks." *Id.* at 418. See also *Coors Brewing*, 115 S. Ct. at 1591-1592. In this case as well, there is no evidence that the effect of the ordinance on the volume of commercial speech for the targeted product will be anything other than minimal. Thus, for all that appears from the record, the impact of the Baltimore ordinance will be no more substantial than that of Cincinnati's newsrack ban.[12]

In very similar circumstances, the Ninth Circuit recently invalidated a restriction on certain broadcast advertising of casino gambling. Noting that the restriction was riddled with exceptions, the Ninth Circuit concluded that "it is impossible for [the statutory scheme] materially to discourage" the disfavored conduct. *Valley Broadcasting Co.* v. *United States*, 1997 U.S. App. LEXIS 3291, at *21 (9th Cir. Feb. 15, 1997). The court explained that "'there is little chance that [the challenged regulation] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects.'" *Ibid.*, quoting *Coors Brewing*, 115 S. Ct. at 1593 (bracketed material added by the court). Precisely the same thing is true here, and the Fourth Circuit's failure to consider the efficacy of the ordinance in light of its many exceptions cannot be reconciled with the Ninth Circuit's analysis.

None of this, of course, is to gainsay the importance of minimizing smoking by minors. As we have explained, however, there

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[12] Cincinnati's ban removed 62 newsracks while leaving 1500 to 2000 in place. 507 U.S. at 412-414, 418. The effect in Baltimore is likely to be comparable. See Ct. App. J.A. 1122-1123, 1128-1136 (examples of cigarette advertising on outdoor signs unaffected by Ordinance 307).

is reason to doubt that any advertising ban will reduce demand for cigarettes. And the patent inefficacy of the qualified restriction imposed by the City means that truthful commercial speech — speech that is presumptively valuable both to the speaker and to listeners (to adult smokers, if to no one else) — is being suppressed to no effect at all. Indeed, in the absence of proof that the ordinance in fact achieves its stated purpose, it is fair to infer that the City is restricting disfavored speakers or forms of speech "in the service of other objectives that could not themselves justify a burden on commercial suppression." *Edenfield*, 507 U.S. at 771.[13] This Court should make clear that such an approach is impermissible.

2. Justice Stevens also emphasized in *44 Liquormart* that the government bears the burden of showing that "its restriction on speech [is] no more extensive than necessary." 116 S. Ct. at 1510. The Rhode Island ban failed that requirement because, among other things, "educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective" than the restriction on advertising. *Ibid.* Justice O'Connor agreed that "[t]he availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." *Id.* at 1521. And she, too, concluded that the availability of such alternatives — specifically including "an educational campaign about the dangers of alcohol consumption" (*id.* at 1522) — rendered the Rhode Island law unconstitutional because "the fit between ends and means is not narrowly tailored." *Ibid.* See also *Coors*, 115 S. Ct. at 1593.

Again, the ordinance cannot survive the application of this principle — and the court of appeals went fatally astray in ignoring

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[13] Here, for example, it is possible that the City actually is not concerned with discouraging smoking at all, but instead wants generally to discourage the use of billboards, or wants advertising revenue to be transferred from billboard owners to the operators of MTA buses and sports arenas. Limits on discovery imposed by the courts below — which believed that they needed to consider only the logical nexus between the City's stated means and ends — made it impossible for Penn to explore those possibilities.

it. Thus, the court refused even to consider the possibility of additional law enforcement efforts to improve compliance with existing (or new) laws, or additional educational efforts to discourage minors from smoking; the district court made no factual inquiry into whether such efforts would be as (or more) effective than the advertising ban. Yet as Judge Butzner noted, such alternatives were proposed below. See *Anheuser-Busch II*, at *20 (App., *infra*, 58a).[14] As the opinions of both Justices Stevens and O'Connor make clear, courts are obligated to consider the efficacy of such alternatives before upholding a restriction on commercial speech.

Entirely apart from the possibility of using non-speech methods to advance the City's interest, the ordinance also fails the narrow tailoring requirement because it is patently *underinclusive*. In *Discovery Network*, the Cincinnati regulation invalidated by the Court, which ostensibly was designed to further the city's interest in safety and esthetics, prohibited newsracks used to distribute commercial fliers, while permitting newspaper newsracks. See 507 U.S. at 413-414. Observing that commercial newsracks "are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks" (*id.* at 425), the Court held that "the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests." *Id.* at 424 (emphasis in original). The Court accordingly held that, "[b]ecause the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty concluding * * * that the city has not established the 'fit' between its goals and its chosen means that is required by our opinion in *Fox*." *Id.* at 428.

Precisely the same thing is true here. The legislative record falls far short of establishing that there is any meaningful difference

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[14] There is substantial evidence, acknowledged by the federal government, that such alternatives may be highly effective. See 58 Fed. Reg. 45,156, 45,165 (Aug. 26 1993) (when issuing proposed rule relating to restrictions on tobacco sales to minors, HHS recognized that "[e]liminating virtually all sales to minors does not even present particularly difficult enforcement problems"); 61 Fed. Reg. 1492, 1498 (Jan. 19, 1996) (when issuing final rule, HHS recognized that "State enforcement of access laws can significantly reduce tobacco use by children").

between the signs affected by the ordinance, on the one hand, and the myriad advertisements permitted by the ordinance on buses and taxicabs, at the Camden Yards baseball stadium, and on the exterior walls of the innumerable retail establishments that sell cigarettes. The court of appeals offered no reason to believe — and there is absolutely no evidence establishing — that the approved signs are seen less often by minors or are any different in their impact than are the signs proscribed by the ordinance, which are located in the very same areas of the City. And just as the inefficacy of the ordinance suggests that it may advance a hidden purpose, so too the manifest underinclusiveness of the restriction on speech raises the inference that the City is serving other objectives that could not themselves justify a limit on commercial expression. In these circumstances, the ordinance plainly is invalid under the principle articulated in *Discovery Network*.

4. The Court of Appeals' Suggested Distinctions of *44 Liquormart* Lack Substance And Will Cause Considerable Confusion

In nevertheless reinstating its original opinion, the court of appeals offered three reasons for finding *44 Liquormart* irrelevant. First, the court opined that the ordinance, in contrast to the Rhode Island law, is a time, place, and manner restriction that does not bar all speech about a particular subject. Second, the court reasoned that the ordinance does not substitute a speech ban for a straightforward ban of the disfavored product. And third, the majority justified the ordinance as a measure designed to protect children. See *Anheuser-Busch II*, at *9-*14 (App., *infra*, 53a-55a). None of these rationales has merit. Yet unless reviewed and corrected, the Fourth Circuit's misunderstanding of *44 Liquormart* is sure to confuse an already complex and difficult area of the law.

a. At the outset, there is an obvious disconnect between all of the panel's rationales and the principles applied in *44 Liquormart*. None of the panel's proposed distinctions of *44 Liquormart* has *anything* to do with the requirement that there be meaningful judicial review, based on the record, of the *efficacy* of and *need* for the City's restriction on speech. The majority below therefore must have meant to hold that whenever an advertising restriction is not a complete ban on speech, or is not a substitute for a ban of the affected product, or is ostensibly designed to protect minors, there

is no need for the government to show either that the regulation in fact advances the governmental goal or that its speech restriction is narrowly tailored. That holding, however, is entirely without support. The court's approach, after all, would mean that truthful commercial speech — speech of a type that has "value in the marketplace of ideas" and that is "'indispensable'" to the functioning of the Nation's economy (*44 Liquormart*, 116 S. Ct. at 1504, 1505 (opinion of Stevens, J.) (citation omitted)) — often may be suppressed even when doing so does not in fact materially serve *any* legitimate state purpose. Such a conclusion is inconsistent both with *44 Liquormart* and with the central thrust of all of this Court's recent commercial speech decisions. See *id.* at 1509-1510; *id.* at 1522 (O'Connor, J., concurring in the judgment).

b. As this fundamental defect in the court of appeals' analysis suggests, the particulars of the panel's proposed distinction of *44 Liquormart* are incorrect. First, the panel's holding that close review is unnecessary whenever the ban on speech affects only certain methods of communication cannot be reconciled with this Court's precedents.[15] The Court thus repeatedly has applied the efficacy and narrow tailoring requirements in decisions — relied upon by both Justices Stevens and O'Connor in *44 Liquormart* — that did not involve complete bans on speech about particular subjects.[16] Indeed, close judicial review on a factually developed re-

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[15] The court of appeals' suggestion that the ordinance is a time, place, and manner requirement is plainly wrong. This Court repeatedly has held that time, place, and manner analysis does not apply when the challenged regulation turns on the content of the restricted speech. See, *e.g.*, *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 429 (1993); *Bolger* v. *Youngs Drug Product Corp.*, 463 U.S. 60, 69-70 n.18 (1983). Here, of course, application of the ordinance turns entirely on the content of the affected sign. While the ordinance may be a time, place, and manner restriction from the standpoint of non-party tobacco companies, it most assuredly is not from petitioner's standpoint.

[16] In *Edenfield*, for example, the Court invalidated Florida's ban on in-person solicitation of business by certified public accountants. Unlike the law at issue in *44 Liquormart*, the Florida rule was not designed to suppress all speech on particular subjects; instead, like the ordinance, it was directed at a particular *method* of communication. The case therefore

cord is especially important when, as here, the government imposes a gerrymandered restriction on speech that may serve as a pretext to punish disfavored speakers.[17]

c. Second, the court of appeals also was wrong in concluding that, under *44 Liquormart*, proof of efficacy and narrow tailoring are unnecessary when the speech restriction does not "substitut[e] a ban on advertising for a ban on the product" (*Anheuser-Busch II*, at *10 (App., *infra*, 53a)); the Fourth Circuit opined that there was no such "substitution" here because sale of tobacco to minors already is banned. *Ibid.* But this turns *44 Liquormart* on its head. At least four Justices in *44 Liquormart* would have applied the *strictest* scrutiny, akin to that applicable to restrictions of political speech, to regulations of commercial speech "that seek to keep people in the dark for what the government

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came to the Court "testing the solicitation, nothing more." 507 U.S. at 765. The Court nevertheless held that close scrutiny of the restriction was necessary because "Florida's law threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." *Id.* at 766. For that reason, the Court insisted — and reiterated on no fewer than three occasions in its opinion — that such a restriction on commercial speech will be invalidated unless it "advances [the state's] interests in a direct and material way." *Id.* at 767. See *id.* at 770-771, 777. A review of the record demonstrated that the Florida rule failed that test.

[17] In that regard, this case stands in sharp contrast to cases like *Florida Bar* v. *Went For It, Inc.*, 115 S. Ct. 2371 (1995), which also involved a ban on a particular method of advertising. There, the restriction was aimed at incidental effects of the targeted speech (the impact of aggressive direct mail solicitations on "the flagging reputations of Florida lawyers" and on the feelings of accident victims and their families). *Id.* at 2376. The restriction therefore necessarily singled out the method of speech that engendered those effects. Here, the restriction is aimed at the *direct* effect of the targeted speech, and there accordingly is no logical reason to distinguish between different media that are carrying the same message. In such circumstances, it may be fair to infer that the government is restricting disfavored speakers for ulterior, and very likely invidious, reasons.

perceives to be their own good." 116 S. Ct. at 1508 (opinion of Stevens, J.). See *id.* at 1515-1518 (Thomas, J., concurring in part and concurring in the judgment). But no Member of the Court suggested abandoning the requirement that courts take a close look at *all* commercial speech restrictions. To the contrary, Justice Stevens explained that the government must satisfy the efficacy and narrow tailoring requirements "even under the less than strict standard that generally applies in commercial speech cases" (*id.* at 1510), and Justice O'Connor agreed (*id.* at 1521-1522). The Fourth Circuit's distinction of *44 Liquormart* therefore did not relieve it of the obligation to review the record.

d. Finally, the ordinance cannot be upheld simply because its ostensible aim is the protection of children. That purpose surely is a substantial one. As a general matter, however, "the government may not 'reduce the adult population ... to reading only what is fit for children.'" *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983) (citation omitted) (ellipses inserted by the Court). And simply stating a benign purpose does not relieve the state of its obligation to demonstrate that the restriction in fact "will advance its interest * * * 'to a material degree'" and is "no more extensive than necessary." *44 Liquormart*, 116 S. Ct. at 1509 (opinion of Stevens, J.) (citing *Edenfield*, 507 U.S. at 771). After all, "[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). The point is proved by the very authority cited by the court of appeals: in *Denver Area Educ. Telecommunications Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374, 2391-2391 (1996), the Court, after a searching review of the regulatory structure, struck down a regulation designed to protect children because it was not narrowly tailored. This is an essential protection. In the absence of proof that the restriction in fact satisfies the third and fourth prongs of *Central Hudson*, the government — simply by declaring an interest in protecting children — could restrict disfavored speakers or forms of speech "in the service of other objectives that could not themselves justify a burden on commercial expression." *Edenfield*, 507 U.S. at 761.

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The court of appeals endorsed an approach that would strip commercial speech — and, by extension, all forms of expression that are protected by intermediate scrutiny — of meaningful protection. We explained in our initial petition in this case that the Fourth Circuit's approach cannot be reconciled with this Court's decisions. This Court then remanded the case for reconsideration in light of *44 Liquormart*, a decision that, while closely divided on other questions, reaffirmed the Court's commercial speech jurisprudence in the strongest terms. The Fourth Circuit's disregard for that clear line of authority will lead to the suppression of valuable expression and breed confusion in the lower courts. Further review therefore is in order.

II. FEDERAL LAW PREEMPTS THE BALTIMORE ORDINANCE

The court of appeals' rejection of Penn's preemption argument also presents an issue calling for this Court's review. The decision below, if allowed to stand, will upset a complex and carefully balanced legislative compromise struck by Congress. In enacting the Act, Congress sought to ensure that the public would be "adequately informed" about the health risks associated with smoking by requiring cigarette packages (and later, cigarette advertisements) to carry specified health warnings. 15 U.S.C. § 1331. At the same time, Congress acted to "protect commerce and the national economy" to "the maximum extent consistent with [that] declared policy" by preserving cigarette manufacturers' ability to advertise their products free from "diverse, nonuniform, and confusing" state and local regulations based on smoking and health. *Ibid.* To give effect to this policy of national uniformity, the Act expressly preempts any "requirement or prohibition based on smoking and health * * * imposed under State law with respect to the advertising or promotion of * * * cigarettes * * *." 15 U.S.C. § 1334(b). This provision "[p]rohibits health-related regulation or prohibition of cigarette advertising by any State or local authority." S. Rep. No. 566, 91st Cong., 1st Sess. 1 (1969). Baltimore's ordinance is clearly a prohibition of advertising within the scope of the Act, and as such is preempted.

As we have explained (at 8-9 & n.6, *supra*), restrictions on cigarette advertising like those in the ordinance have been adopted or are being considered by states and municipalities across the

nation, including many of the country's largest cities. All of those restrictions have been, or are likely to be, challenged on preemption grounds. That makes it imperative for the Court to settle at the earliest possible date the scope of the Act's preemption provision. And that is especially so because the Fourth Circuit's decision, which cannot be reconciled with a recent holding of the Second Circuit, has engendered considerable confusion in a heavily regulated and much-litigated area.[18]

1. In *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (plurality opinion), this Court held that the central preemption inquiry under the Act tracks the language of the statute: "whether the [predicate] legal duty * * * constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'" *Id.* at 524. Ostensibly applying this straightforward test, the Fourth Circuit reached the remarkable conclusion that the Act does *not* preempt the ordinance. This conclusion is irreconcilable both with the language of the Act and with the Court's holding in *Cipollone*.

The court of appeals began by stating that "Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements." App., *infra*, 11a (emphasis in original). But the notion that the ordinance is a regulation only of "place and manner" (*id.* at 12a) is nonsensical, since Penn and other sign owners are being told what kinds of messages they may put on their signs. Indeed, the restriction on location is determined *entirely* by the sign's content. This Court consistently has viewed such restrictions as content-based. See, *e.g.*, *Burson* v. *Freeman*, 504 U.S. 191, 197 (1992) (prohibition on campaigning within 100 feet of polling place is content based because the right to speak "depends entirely on whether the[ ] speech is related to a political campaign"); *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530 (1980) (rule prohibiting utili-

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[18] The preemption issue was raised in Penn's initial petition for certiorari; it was not specifically addressed in the Court's order vacating and remanding the Fourth Circuit's initial decision. The issue was specifically preserved in Penn's petition for rehearing (at 1 n.1) after issuance of the court's of appeals' post-remand decision.

ties from using bill inserts to discuss political matters is a content-based restriction).

Nor did the Fourth Circuit make any attempt to explain why the distinction it drew (even if that distinction otherwise were intelligible) would have any significance under the preemption provision. In fact, the Act does not differentiate between restrictions directed to the content of cigarette advertisements and restrictions of any other sort. To the contrary, the scope of the preemption provision "reaches beyond statements 'in the advertising'" and instead preempts *all* state regulation based on health concerns "'with respect to the advertising or promotion' of cigarettes." *Cipollone*, 505 U.S. at 520 (plurality opinion). As this Court noted in *Cipollone*, when Congress amended the Act in 1969 it substantially broadened the preemption provision. *Ibid.* As originally enacted, the Act precluded state and local authorities only from requiring "any *statement* * * * relating to smoking and health in the advertising of cigarettes." 15 U.S.C. § 1334(b) (1965) (emphasis added). But the "obviously broader language of the 1969 version extended [the Act's] pre-emptive reach." *Cipollone*, 505 U.S. at 523 (plurality opinion). In its current form, the Act preempts *any* state or local "requirement or prohibition based on smoking and health * * * with respect to the advertising or promotion" of cigarettes.

The Fourth Circuit's inscrutable conclusion that the advertising restriction at issue does not "impose[ ] a duty [ ]or relieve[ ] a burden on cigarette advertisers based on smoking and health" is similarly without basis or explanation. App., *infra*, 11a. To the extent it is germane, it is now undisputed that the City Council's enactment of the ordinance *was in fact* based on health concerns, as the City conceded at oral argument. See Ct. App. Tr. 23 (agreeing with Judge Butzner that the City Council enacted the ordinance out of its "concern[ ] with the health of children"). Indeed, the court of appeals itself acknowledged that the policy underlying the ordinance rested on "the current public concern over the dangers of cigarette consumption by minors," and health considerations were a central part of the finding of substantial govern-

mental interest underlying the panel's First Amendment analysis. App., *infra*, 12a.[19]

Finally, the court of appeals relied on its observation that the ordinance has the same "general relationship" to the health effects of smoking as do common law claims for breach of express warranty, fraudulent misrepresentation, and conspiracy, which the *Cipollone* Court held were not preempted by the Act. App., *infra*, 11a. In so holding, however, the Fourth Circuit simply disregarded this Court's explanation that such claims "are not predicated on a duty 'based on smoking and health'" but rather on *independent* duties, such as the "duty not to make false statements" of material fact or to conceal such facts. *Cipollone*, 505 U.S. at 528-529. In contrast, of course, the City has conceded that the ordinance is predicated on the relationship between smoking and health. The ordinance is not like an anti-littering restriction that affects all advertising leaflets equally, including those advertising cigarettes, and that might be analogous to a general ban on misrepresentation; instead, it is a prohibition that targets cigarette advertising precisely because of the perceived connection between "smoking and health."[20] Preemption therefore is mandated by the Act.

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[19] As we note above (at note 2), the court of appeals pointedly did not accept the City's contention that the ordinance was intended only to facilitate compliance with a state law that precludes the sale of cigarettes to minors. Indeed, the Maryland statute referred to by the City is itself related to smoking and health (see Ct. App. J.A. 1013-1014), and insofar as the purpose of the ordinance is to encourage compliance with the state law, the ordinance must be understood to share the purpose of that law. If, moreover, the ordinance were intended both to serve health concerns and to foster compliance with state law, this Court has held that a state or local regulation is preempted by federal law so long as *one* purpose of the statute is impermissible. *Gade* v. *National Solid Waste Management Ass'n*, 505 U.S. 88 (1992) (state environmental regulation preempted despite the state's assertion of a non-preempted purpose in addition to preempted purpose); *Perez* v. *Campbell*, 402 U.S. 637 (1971) (state may not evade preemption by articulating some purpose other than preempted purpose).

[20] The common law claims that the Court allowed plaintiffs to pursue in *Cipollone* — claims for breach of express warranty and intentional

2. The decision below is of particular importance because it is directly at odds with a careful legislative compromise that lay behind passage of the Act in 1965 and the extension of its preemptive reach in 1969. Congress included the preemption provision in the original version of the Act in 1965 because it recognized that the states were eager to become involved in the regulation of cigarette labeling and advertising, and it was concerned about the effects of such state and local regulation upon "commerce and the national economy."[21] As the termination date of the 1965 Act approached, Congress determined to amend the Act to further protect "commerce and the national economy" from "the chaos created by a multiplicity of conflicting regulations." S. Rep. No. 566, 91st Cong., 1st Sess. 1, 12 (1969). In the face of renewed efforts at the state level to regulate or ban cigarette advertising (see *Cipollone*, 505 U.S. at 515 & n.11), Congress crafted a careful and balanced compromise. In addition to strengthening the warning label required on cigarette packages, the 1969 amendments banned cigarette advertising on radio and television. 15 U.S.C. § 1335. At the same time — and related to the ban on radio and television advertising (see *Cipollone*, 505 U.S. at 515) — Congress broadened the preemptive scope of the Act. Its express purpose in doing so was to ensure "a comprehensive Federal program to deal with cigarette labeling and advertising with respect to *any relationship*

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misrepresentation or fraud — were held not to be preempted because, although they could be *applied* to statements made by cigarette manufacturers in their advertising, the duties giving rise to those claims were not themselves based on "smoking and health" but applied generally, regardless of what was being advertised. The justification for those duties thus was not a concern about the health effects of smoking. By contrast, the Baltimore ordinance is specifically focused on cigarette advertising and is premised on smoking and health concerns.

[21] See *Hearings on S. 559 and S. 547 Before Senate Committee on Commerce*, 89th Cong., 1st Sess. 39 (Surgeon Gen. Terry); S. Rep. No. 195, 89th Cong., 1st Sess. 4; 111 Cong. Rec. 14411 (June 22, 1965) (Rep. Springer).

between smoking and health." 15 U.S.C. § 1331 (emphasis added).[22]

The legislative history of the 1969 amendments demonstrates that Congress intended to preclude any state and local regulation targeted at cigarette advertising. Senator Magnuson, the Senate manager of the conference report, confirmed this interpretation in a colloquy with Senator Cooper in the final Senate floor debate on the conference report. To establish an authoritative interpretation of the legislation, Senator Cooper asked Senator Magnuson whether the Act "preempts the States from *any* action restricting [cigarette] advertising." 116 Cong. Rec. 6640 (1970) (emphasis added). Senator Magnuson's answer was an unequivocal "Yes." *Ibid.* Any reading of the preemption provision that would permit state or local bodies to ban cigarette advertising would undermine the purpose of the carefully crafted political compromise embodied in the 1969 amendments: protecting "commerce and the national economy" to the "maximum extent" consistent with the policy of informing the public about the relationship between smoking and health.

3. Given the patent inconsistency of the decision below both with *Cipollone* and with the language of the Act, it comes as no surprise that the Fourth Circuit's approach has created an intercircuit conflict. In *Vango Media, Inc.* v. *City of New York*, 34 F.3d 68 (2d Cir. 1994), a post-*Cipollone* decision of the Second Circuit, a company that displayed advertisements on New York City taxicabs brought a challenge under the Act's preemption

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[22] *See also Cigarette Advertising and Labeling: Hearing on H.R. 6543 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 103 (1969) (Sen. Magnuson) (advertising issue is "a national matter"); *id.* at 120 (Sen. Goodell) (need for federal preemption "so you don't have to deal with State and local regulations"); *id.* at 130 (Vincent T. Wasilewski, National Association of Broadcasters) ("Congress should not permit unilateral action by the several States"); *id.* at 177 (Sen. Moss) ("This is a national problem and it must be dealt with on a national basis."); *Cigarette Advertising and Labeling: Hearing on H.R. 643, H.R. 1237, H.R. 3055, H.R. 6543 Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 16 (1969) ("this is the jurisdiction of this Congress and nobody else."); *id.* at 21 (Rep. McMillan); *id.* at 24, 225, 27, 30 (Rep. Fountain).

provision to a New York City ordinance that required city-licensed facilities to display at least one anti-smoking message for every four tobacco advertisements displayed. The Second Circuit held the New York ordinance preempted, rejecting many of the arguments raised by the City here.[23]

The Second Circuit was unpersuaded by New York's argument that its ordinance at issue was not one "with respect to the advertising or promotion of any cigarettes" because it "impose[d] no requirements or prohibitions on the content, format or display of cigarette advertisements * * * ." *Id.* at 73. The Second Circuit acknowledged that under the New York City ordinance "the actual cigarette advertisements would not look different," and therefore might not have been preempted under the narrower provision of the 1965 Act. *Id.* at 74. The court found, however, that "the more expansive reach of § 1334(b), as clearly evidenced by its amended language [under the 1969 amendments], precludes that result." *Id.* The Second Circuit therefore concluded that, even though the New York ordinance "treads on the area of tobacco advertising * * * only at the edges * * * it implicates § 1334(b)." *Id.* at 74.

In this case, the City has adopted a regulation that does far more than affect cigarette advertising "at the edges." Instead, Ordinance 307 prohibits an entire category of cigarette advertising outright, in an effort to promote public health. The Fourth Circuit's decision that such local regulation is consistent with the Act cannot be reconciled with the Second Circuit's holding in *Vango Media*.

New York also argued in *Vango Media* that the local law "was enacted in light of the economic costs related to smoking, and not on smoking and health considerations." 34 F.3d at 73. But the Second Circuit rejected the notion that it was bound by New York's characterization of the purpose of the ordinance. Instead, the court

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[23] The plaintiff in *Vango Media* also raised a First Amendment argument. But because the district court held the New York ordinance preempted, that court found it unnecessary to reach the First Amendment issue. Notwithstanding the "patent First Amendment problems with the Local Law" (*Vango Media*, 34 F.3d at 71), the Second Circuit likewise found it unnecessary to address the constitutional question.

undertook its own examination of the local law's purpose and concluded that the New York City Council was motivated by a concern about the effects of smoking on public health. *Ibid.* The same is true here, and the result should be the same: the ordinance must be preempted. Further review therefore is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1997

APPENDIX

APPENDIX A

PENN ADVERTISING OF BALTIMORE, INCORPORATED

Plaintiff-Appellant

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, A Municipal Corporation; Kurt L. Schmoke, in his official capacity as Mayor of Baltimore City; David Tanner, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Defendants-Appellees.

The American Advertising Federation; The American Association of Advertising Agencies; The Association of National Advertisers, Incorporated; The Outdoor Advertising Association of America, Incorporated; Washington Legal Foundation; The City of Cincinnati, Ohio; The Maryland Congress of Parents & Teachers, Incorporated; The Coalition for Beautiful Neighboroods; Baltimore City Wide Liquor Coalition for Better Laws and Regulations; City and County of San Francisco; City of San Jose; United States of America, Amici Curiae.

No. 94-2141

United States Court of Appeals,
Fourth Circuit.

NOVEMBER 13, 1996

On Remand from the United States Supreme Court.

Before NIEMEYER and HAMILTON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge NIEMEYER wrote the majority opinion, in which Judge HAMILTON joined. Senior Judge BUTZNER wrote a dissenting opinion.

NIEMEYER, Circuit Judge:

On May 13, 1996, The Supreme Court handed down its decision in *44 Liquormart, Inc.* v. *Rhode Island*, --- U.S. ----, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), and shortly thereafter vacated our decision in this case and remanded it to us "for further consideration in light of *44 Liquormart, Inc.* v. *Rhode Island*." --- U.S. —, 116 S.Ct. 2575, 135 L.Ed.2d 1090 (1996). We have read the opinion in *44 Liquormart* and have considered its impact on the judgment in this case. For the reasons given in *Anheuser-Busch, Inc.* v. *Schmoke*, 63 F.3d 1305 (4th Cir. 1995) (Anheuser-Busch I), as modified by our decision today in *Anheuser-Busch, Inc.* v. *Schmoke*, 101 F.3d 325 (4th Cir. 1996) (Anheuser-Busch II), we conclude that *44 Liquormart* does not require us to change our decision in this case. Accordingly, we affirm the district court's judgment for the reasons previously given and readopt our previous decision as modified by *Anheuser-Busch II*. See *Penn Adv. of Baltimore* v. *Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995).

IT IS SO ORDERED.

BUTZNER, Senior Circuit Judge, dissenting:

I dissent for reasons that I explained in my dissent in No. 94-1431, *Anheuser-Busch, Inc.* v. *Schmoke*, and No. 94-1432, *Penn Advertising of Baltimore, Inc.* v. *Curran*.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PENN ADVERTISING OF BALTIMORE, INCORPORATED,

Plaintiff-Appellant,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, A Municipal Corporation; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Defendants-Appellees.

THE AMERICAN ADVERTISING FEDERATION; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INCORPORATED; WASHINGTON LEGAL FOUNDATION; THE CITY OF CINCINNATI, OHIO; THE MARYLAND CONGRESS OF PARENTS & TEACHERS, INCORPORATED; THE COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS; CITY AND COUNTY OF SAN FRANCISCO; CITY OF SAN JOSE,

Amici Curiae.

No. 94-2141

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Herbert F. Murray, Senior District Judge.
(CA-94-877-HM)

Argued March 6, 1995.
Decided Aug. 31, 1995.

Before NIEMEYER and HAMILTON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge HAMILTON and Senior Judge BUTZNER joined.

NIEMEYER, Circuit Judge:

We must decide in this case (1) whether Ordinance 307 enacted by the Mayor and City Council of Baltimore, Maryland, prohibiting the placement of stationary, outdoor "advertising that advertises cigarettes" in certain areas of the City, is preempted by the Federal Cigarette Labeling and Advertising Act or by Maryland statutes prohibiting the sale of cigarettes to minors or the possession of cigarettes by minors; and (2) whether that ordinance violates the First and Fourteenth Amendment protections of commercial speech. The district court, granting Baltimore's motion for summary judgment, ruled that neither federal nor state law preempts the operation of Baltimore's ordinance and that the ordinance is a permissible regulation of commercial speech under the four-part test announced in *Central Hudson Gas and Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). We affirm.

I

Even before 1994, it was illegal in Maryland for any person to purchase cigarettes for, or sell them to, "any individual under the age of 18 years." Md.Ann.Code art. 27, § 404 (1992). In 1994, Maryland also enacted statutes, effective October 1, 1994, prohibiting minors from using or possessing "any tobacco product." Md.Ann.Code art. 27, §§ 404 & 405A (Supp.1994). A few months earlier, in April 1994, the Mayor and City Council of Baltimore (collectively "Baltimore"), in a further effort to reduce the illegal consumption of cigarettes by minors, enacted Ordinance 307. The ordinance prohibits the placement of any sign that "advertises cigarettes in a publicly visible location," *i.e.* on

"outdoor billboards, sides of building[s], and free standing signboards."[1] The prohibition contained in Ordinance 307 parallels the scope and language of Baltimore City Ordinance 288, enacted in January 1994, which regulates the advertising of alcoholic beverages. Thus, the prohibition against cigarette advertising in Ordinance 307 mirrors Ordinance 288's exceptions permitting such advertising on buses, taxicabs, commercial vehicles used to transport cigarettes, and signs at businesses licensed to sell cigarettes, including professional sports stadiums. As with Ordinance 288, Ordinance 307 also contains an exception permitting such advertising in certain commercially and industrially zoned areas of the City.

Before enacting the ordinance, the Baltimore City Council conducted public hearings, receiving testimony and previously-conducted studies detailing the correlation between cigarette advertising and the consumption of cigarettes by minors. The City Council found, as expressed in the preamble to Ordinance 307, that cigarettes are the most heavily advertised product in America and that "there is specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors." It referred specifically to 10 studies and articles supporting that position. The City Council also relied on the 1992 Maryland Adolescent Drug Survey conducted by the Maryland Department of Education to support its conclusion that cigarettes are the second most commonly abused substance by Maryland adolescents, with approximately 42% of twelfth graders and 11% of sixth graders having smoked cigarettes in the previous 12 months. The City Council emphasized further that 75% of

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[1] The core provision of Ordinance 307 provides:

> Cigarette advertisements. No person may place any sign, poster, placard, device, graphic display, or other form of advertising that advertises cigarettes in a publicly visible location. In this section "publicly visible location" includes outdoor billboards, sides of building[s], and free standing signboards.

Baltimore City Code, Art. 30 (zoning), § 10.0-1(I). By its terms, the ordinance became effective April 6, 1994.

twelfth graders had smoked cigarettes before the age of 15. It noted that cigarettes constitute a "gateway drug" for Maryland students, as they are often the first drug used by adolescents and "appear[ ] to 'open the door' for use of other harder drugs at a later date." Therefore, to reduce the illegal consumption of cigarettes by minors, the City Council concluded that it would be reasonable to restrict the placement of publicly visible cigarette advertisements in the City.

On April 6, 1994, the date on which Ordinance 307 became effective, Penn Advertising of Baltimore, Inc., filed suit in federal court to enjoin the ordinance's enforcement and to obtain a declaratory judgment (1) that the ordinance is preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), and by Maryland statutes regulating the sale of cigarettes, and (2) that the ordinance violates the First and Fourteenth Amendments. Penn Advertising, which leases land from private property owners, maintains outdoor signs on those locations, and rents them to its customers, filed suit to protect its business of placing cigarette advertisements on outdoor signs located in Baltimore.

With its complaint, Penn Advertising filed a motion for a preliminary injunction to enjoin, pending litigation, enforcement of Ordinance 307. In response, Baltimore filed a motion to dismiss or, in the alternative, for summary judgment. While Penn Advertising obtained some discovery following the filing of these motions, it desired to conduct more discovery and thus filed a motion to extend the time to file its opposition to Baltimore's summary judgment motion. The district court denied the motion and established a briefing schedule for the parties. The court also entered an order staying enforcement of the ordinance.

On August 15, 1994, the district court filed a memorandum opinion granting Baltimore's motion for summary judgment. The district court concluded that Ordinance 307 is preempted neither by the Federal Cigarette Labeling and Advertising Act nor by Maryland state law. On the First Amendment issue, the court concluded that Ordinance 307 satisfied all four prongs of the

Central Hudson test and was thus a permissible regulation of commercial speech. This appeal followed.[2]

II

We address first a preliminary contention that the district court abused its discretion in refusing to extend Penn Advertising's time to conduct discovery and respond to Baltimore's motion for summary judgment. Penn Advertising argues that the court granted summary judgment "before there had even been adequate time for Penn Advertising to assemble a full evidentiary record and after denying Penn Advertising's motion for leave to take discovery for the purpose of further establishing the disputed factual record."

While the district court granted Penn Advertising a short extension to respond to the motion for summary judgment, it did not generally open up the case for discovery before ruling on the issues. It concluded that such discovery was not necessary in view of the nature of the issues presented. The district court stated that the questions presented are "legal questions ripe for decision" because the case concerns "a facial attack on the legal sufficiency of an ordinance." *Penn Advertising of Baltimore, Inc.* v. *Mayor and City Council of Baltimore*, 862 F.Supp. 1402, 1405 (D.Md.1994). Penn Advertising nonetheless was able to oppose the motion for summary judgment with affidavits, various studies, and samples of advertising, and has failed to identify any further materials or theories which it desired, but was unable, to present to the district court.

We agree that the issues presented to the district court were questions of law which could be resolved without further development of the factual record. The preemption issue rests on

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[2] Amici curiae briefs were received in this appeal from the American Advertising Federation, the American Association of Advertising Agencies, the Association of National Advertisers, Inc., the Outdoor Advertising Association of America, Inc., the Washington Legal Foundation, the Maryland Congress of Parents & Teachers, Inc., the Coalition for Beautiful Neighborhoods, the Baltimore City Wide Liquor Coalition for Better Laws and Regulations, the City of Cincinnati, the City and County of San Francisco, and the City of San Jose.

a legal interpretation of the federal statute which allegedly preempts the ordinance. As the Supreme Court noted in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, ----, 112 S.Ct. 2608, 2618, 120 L.Ed.2d 407 (1992), "the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act." Our interpretation of the instant issue as involving solely a question of law is also consistent with the procedural posture of the *Cipollone* case before the Supreme Court, *i.e.* on review of a motion under Federal Rule of Civil Procedure 12(f) to strike the preemption defense as a matter of law.

Furthermore, we agree with the district court that a facial challenge to an ordinance restricting commercial speech may be resolved as a question of law when the government meets the burden placed on it by Central Hudson. We decided the same question in the companion case of *Anheuser-Busch, Inc.* v. *Schmoke*, 63 F.3d 1305 (4th Cir.1995), where we stated:

> [I]n response to a facial challenge to a regulation of commercial speech, the burden falls on the government to justify its legislative action, but it does not demand that the government canvass every conceivable situation in which some member of the public may be affected atypically by the statute. And the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met.

63 F.3d at 1311. The determinative question in reviewing a facial challenge to an ordinance thus is whether the legislative body acted with the objectively reasonable belief that the means it selected fit the objective sought. The issue is not whether the substantive findings on which it relied are incontrovertibly true. As we explained in *Anheuser-Busch*:

> While a party [facially] challenging an ordinance can point to other factors not considered by the legislature to demonstrate that the legislature acted irrationally, it cannot subject

> legislative findings themselves to judicial review under a clearly erroneous standard or otherwise. To do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other.

63 F.3d at 1312.

Since the burden of justifying the ordinance falls on the government and it may carry this burden by pointing to legislative facts, studies, history, or common sense, an understanding of the ordinance's factual impact on particular parties is not necessary to the inquiry. *Id.* at 1311-12. Accordingly, we conclude that the district court did not abuse its discretion in this case by ruling on the summary judgment motion without allowing further discovery.

III

Penn Advertising contends that Ordinance 307 is void because Baltimore's authority to enact such a measure was preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act, which provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). That Act mandates that one of several specified warning messages be placed on each package of cigarettes and prohibits cigarette advertising on television and radio. *See* 15 U.S.C. §§ 1331-1340. Penn Advertising argues that since Ordinance 307's prohibition of cigarette advertising is "based on smoking and health," it is preempted by the federal statute. Its argument rests entirely on the analysis of § 5(b) of the federal act conducted by the Supreme Court in *Cipollone* v. *Liggett Group, Inc.*

The lawsuit in *Cipollone* was predicated on the smoking-related death of Rose Cipollone, who began smoking in 1942 and died of lung cancer in 1984. Her son sought damages from cigarette manufacturers, contending that cigarette smoke caused his mother's death. His suit, based on New Jersey common

law, alleged common law claims involving design defects; failure to warn; breach of express warranty; fraudulent misrepresentation; conspiracy to defraud; and negligence in the manner in which cigarettes were tested, researched, sold, promoted and advertised. On the cigarette manufacturers' contention that Cipollone's claims were preempted by the Federal Cigarette Labeling and Advertising Act, the Supreme Court held:

> [T]he 1969 Act pre-empts petitioner's claims based on a failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents' advertising or promotions; the 1969 Act does not pre-empt petitioner's claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

505 U.S. at ----, 112 S.Ct. at 2625. To reach this conclusion, the Court conducted a count-by-count analysis of the common law claims to determine whether each claim implicated duties to warn or to label in connection with smoking and health. The Court explained:

> [W]e must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b) and we must look to each of petitioner's common law claims to determine whether it is in fact preempted.

Id. at ----, 112 S.Ct. at 2621. To sort out those claims that were preempted, the Court stated:

> The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a "requirement or prohibition *based on smoking and health . . . imposed under state law with respect to . . . advertising* or promotion," giving that clause a fair but narrow reading.

Id. at ----, 112 S.Ct. at 2621 (emphasis added). The Court went on to clarify that the appropriate inquiry is "not whether a claim challenges the 'propriety' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion." *Id.* at —, 112 S.Ct. at 2622. *See also Vango Media, Inc.* v. *City of New York,* 34 F.3d

68, 73-74 (2d Cir.1994) (holding that Federal Cigarette Labeling and Advertising Act preempts ordinance requiring city-licensed facilities to display one message addressing the dangers of smoking for every four tobacco advertisements displayed).

Applying the methodology described in Cipollone to Ordinance 307, we conclude that the Federal Cigarette Labeling and Advertising Act does not preempt the ordinance. Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements. The ordinance neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health*. Moreover, the ordinance does not limit the ability of cigarette manufacturers to advertise generally in the media. The regulation simply restricts the location of cigarette-advertising signs, irrespective of the nature of the message communicated. A regulation with such a general relationship to cigarette smoking—in contrast to a specific advertising "prohibition based on smoking and health"—is not preempted by the Federal Cigarette Labeling and Advertising Act. Were the preemption provision to be interpreted so broadly, the Supreme Court in Cipollone could not have allowed the continued prosecution of common law claims for breach of express warranty, misrepresentation, intentional fraud, and conspiracy—all of which relate generally to the effects on health of promoting the sale of cigarettes. *See Cipollone*, 505 U.S. at ---- - ----, 112 S.Ct. at 2621-25.

For similar reasons, we conclude that the Maryland statutes prohibiting the sale of cigarettes to minors and the use and possession of cigarettes by minors, *see, e.g.*, Md.Ann.Code art. 27, §§ 404 & 405A (supp.1994), and Md.Ann.Code, Business Regulation art., § 16-101 *et seq.*, do not preempt the City's ordinance. Penn Advertising argues that Ordinance 307 is invalid because it impliedly was preempted by these state statutes under the doctrine of "preemption by implication" set forth in *Allied Vending, Inc.* v. *Bowie*, 332 Md. 279, 631 A.2d 77 (1993). The court in *Allied Vending* explained that there may be times when "'the legislature may so forcibly express its intent to occupy a specific field of regulation that the acceptance of the doctrine of preemption by occupation is compelled.'" *Id.* at 298, 631 A.2d 77 (quoting *Mayor and City Council of Baltimore* v. *Sitnick*, 254 Md. 303, 323,

255 A.2d 376 (1969)). The reasoning of *Allied Vending*, however, lends little support to Penn Advertising's claim. We can find nothing in §§ 404 and 405A of Article 27 or § 16-101 *et seq.* of the Business Regulation Article that indicates an attempt by the Maryland legislature to preempt the field of cigarette advertising. Moreover, Ordinance 307, which only limits the place and manner of cigarette advertising, is not in conflict with the state provisions prohibiting their sale to minors. For the reasons stated above, as well as those articulated by the district court in its well-reasoned opinion, *see Penn Advertising*, 862 F.Supp. at 1415-20, we reject the contention that Ordinance 307 is preempted and therefore null and void.

IV

Finally, Penn Advertising contends that Ordinance 307 is an impermissible regulation of commercial speech under the four-prong scheme announced in *Central Hudson*. As that case explains, in order for commercial speech to be entitled to any First Amendment protection, the speech must first concern lawful activity and not be misleading. *See Central Hudson*, 447 U.S. at 563, 100 S.Ct. at 2350. If the commercial speech meets those threshold criteria, a state may nevertheless regulate it if (2) the state is able to assert a substantial interest in support of the regulation; (3) the state demonstrates that the regulation "directly advances the governmental interest asserted"; and (4) the regulation is not "more extensive than is necessary" to serve the interest. *Id.* at 566, 100 S.Ct. at 2351.

The governmental interest asserted in this case is to promote compliance with the state prohibition of the sale of cigarettes to minors. The district court concluded that the ordinance also furthers the obvious public policy underlying such a prohibition, "which is to prevent the purchase, and thus the consumption, of cigarettes by minors." *Penn Advertising*, 862 F.Supp. at 1406. In the context of the current public concern over the dangers of cigarette consumption by minors, there can be little opposition to the assertion that the City's objective in reducing cigarette consumption by minors constitutes a substantial public interest.

The principal dispute in this case centers on *Central Hudson's* third and fourth prongs which question whether Ordinance 307

directly advances Baltimore's stated public interest in reducing minors' cigarette consumption and whether the ordinance is not more extensive than necessary to serve that interest, *i.e.* whether it is "narrowly drawn." The inquiry under these two prongs of *Central Hudson* involves consideration of the "fit" between the City's ends and the means chosen to accomplish them. *See United States* v. *Edge Broadcasting Co.*, — U.S. —, —, 113 S.Ct. 2696, 2705, 125 L.Ed.2d 345 (1993); *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 341, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986).

These same issues were resolved in favor of Baltimore in the related case of *Anheuser-Busch, Inc.* v. *Schmoke*, 63 F.3d 1305 (4th Cir.1995). In *Anheuser-Busch*, the City relied on numerous studies that linked alcohol advertising to underage drinking to meet *Central Hudson's* third prong. In response to Anheuser-Busch's challenge to those conclusions, we stated:

> There is a logical nexus between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying Central Hudson's third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. If that were required, communities could never initiate even minor steps to address their problems, for they could never be assured of the success of their efforts. The proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends. Under that approach, we conclude that Baltimore has met its burden of satisfying the third prong of *Central Hudson*.

63 F.3d at 1314. Similarly, in our examination of whether the advertising regulation was narrowly tailored to meet *Central Hudson's* fourth prong, we concluded in *Anheuser-Busch*:

> If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have it focus more efficiently on reaching minors, the City would have to consider those alternatives. But it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon

> altogether an approach that directly advances its goal. In the face of a problem as significant as that which the City seeks to address, the City must be given some reasonable latitude.

63 F.3d at 1316.

For the reasons advanced in *Anheuser-Busch*, we conclude here that, while the fit between the City's objectives and the means selected to achieve them may not be perfect, it nevertheless falls well within the range tolerated by the First Amendment for the regulation of commercial speech.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PENN ADVERTISING OF BALTIMORE, INC.

v.

THE MAYOR AND CITY COUNCIL OF THE CITY OF BALTIMORE, ET AL.

Civ. No. HM-94-877.

Aug. 11, 1994.

MEMORANDUM

HERBERT F. MURRAY, Senior District Judge.

I. INTRODUCTION

Baltimore City Ordinance 307 (Council Bill No. 627) (hereinafter "Ordinance 307") was signed into law by Mayor Kurt L. Schmoke on March 7, 1994. This Ordinance prohibits cigarette advertising on billboards located in certain designated zones within Baltimore City. Plaintiff Penn Advertising of Baltimore, Inc. (hereinafter "Penn") is the owner of billboards located within these zones of prohibition. By its terms Ordinance 307 was to take effect on the 30th day after the date of its enactment. On the thirtieth day after enactment of Ordinance 307, Penn brought this action against defendants The Mayor and City Council of Baltimore, Kurt L. Schmoke, in his official capacity as Mayor of Baltimore City, and David Tanner, in his official capacity as General Superintendent of Zoning Administration and Enforcement of Baltimore City (hereinafter collectively referred to as "the City"). Penn seeks injunctive and declaratory relief.

In its complaint, Penn states three separate grounds upon which it seeks judgment. Penn first claims that Ordinance 307 is in violation of the First Amendment's protection of free speech. Second, Penn claims that Ordinance 307 is pre-empted by Section 5(b) of the Federal Cigarette Labeling and Advertising Act. Lastly,

Penn claims that Ordinance 307 is pre-empted by Maryland State law.

On April 26, 1994, in lieu of filing an answer to Penn's complaint, the City filed a Motion to Dismiss, or in the Alternative, for Summary Judgment.[1] Penn responded by filing a Memorandum in Opposition. After reviewing the parties' memoranda and exhibits, this Court has determined that no hearing is necessary and is prepared to rule on the merits of the City's motion.

II. MOTION FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure permits a grant of summary judgment only if no genuine issues of material fact exist and the moving party is entitled to a judgment as a matter of law. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The burden is on the moving party to demonstrate the absence of such issues of material fact. For the purposes of deciding the present motion, this Court must construe all facts and reasonable inferences in favor of the plaintiff. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

In opposition to summary judgment, however, a party must proffer more than "a mere scintilla of evidence" to raise a genuine issue of material fact. *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. Although not weighing the evidence or determining the truth for the purposes of these motions, the Court must consider "whether reasonable jurors could find by a preponderance of the evidence that [the non-moving party] is entitled to a verdict." *Id.* at 249, 252, 106 S.Ct. at 2510, 2512.

Despite Penn's assertions to the contrary, this Court concludes, after careful review of the pleadings and exhibits, that there is no genuine dispute of material fact in this case, and that the questions presented by plaintiff's Complaint are legal questions ripe for decision by this Court.

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[1] Because the Court has considered matters outside of the pleadings, the Court will not rule on the City's motion to dismiss, but rather on the City's alternative motion for summary judgment.

While Penn asserts that the parties vigorously dispute factual matters, this is not so. The parties vigorously dispute questions of law and it is proper for this Court to decide these questions. There are no factual issues to be decided because this case concerns a facial attack on the legal sufficiency of an ordinance. An example of Penn's mischaracterization of legal issues as factual ones is Penn's statement that "it should at least be clear . . . that the question of whether Ordinance 307 is a prohibition or requirement based on smoking and health is something about which Plaintiff and Defendants sharply disagree." Plaintiff's Opp. to Def. Motion for Summ. Judg., at 9. While the parties do disagree on this issue, that disagreement is not relevant to the determination of whether summary judgment is appropriate because it concerns a legal question which is properly decided by this Court. Similarly, Penn's memorandum contains lengthy legal arguments in support of each of Penn's claims. At the end of each of these legal arguments, Penn asserts that a dispute of fact is involved. But Penn does not direct this Court to any such factual disputes; rather, Penn simply argues the law. This Court finds that there are no genuine disputes of material fact present in this case. Therefore, the Court will rule on the legal issues presented in the parties' memoranda.

A. Ordinance 307 is Constitutional

While it is true that "the First Amendment, as applied to the states through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation," *Central Hudson Gas & Elec.* v. *Public Serv. Comm'n*, 447 U.S. 557, 561, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341 (1980) (citing *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 761-762, 96 S.Ct. 1817, 1825-1826, 48 L.Ed.2d 346 (1976)), it is also well-settled that "commercial speech [enjoys] a limited measure of protection commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978).

The appropriate test for assessing the constitutionality of restrictions on commercial speech was established by the Supreme Court in *Central Hudson*:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351 (1980).

In the instant case, the parties agree that the advertising in question is neither unlawful nor misleading, thereby satisfying the first prong of the *Central Hudson* test. The parties vigorously dispute whether the ordinance complies with the second, third and fourth prongs of the test.

1. The Second Prong: Substantial government interest

In order to satisfy the second prong of the *Central Hudson* test, the City must demonstrate a substantial government interest which the City seeks to achieve by its promulgation of Ordinance 307. The asserted interest of the City, as stated in both its memorandum and in the Preamble to Ordinance 307, is to promote compliance with the state law prohibition against the sale of cigarettes to minors, Md.Ann.Code art. 27, § 404 (1992), thereby also furthering the obvious public policy underlying this prohibition which is to prevent the purchase, and thus the consumption, of cigarettes by minors. This is certainly a sufficiently substantial interest for the purposes of the *Central Hudson* test.

Article 27, § 404 of the Maryland Code declares that "it is unlawful for any person engaged in the manufacture or sale of cigarettes to sell, barter or give cigarettes to any individual under the age of 18 years." Md.Ann.Code art. 27, § 404 (1992). While, as Penn asserts, a minor does not commit an act expressly prohibited by § 404 by purchasing cigarettes, the person selling the cigarettes to a minor is committing an act expressly prohibited by this ordinance. Thus, if the number of minors seeking to purchase cigarettes decreases, the number of transactions in violation of § 404 will also decrease. Ordinance 307 represents a legislative

judgment by the Baltimore City Council that a reduction in the exposure of minors to stimuli encouraging the purchase of cigarettes will result in fewer minors seeking to purchase cigarettes and therefore fewer illegal transactions. Furthermore, the public policy behind § 404 of preventing the purchase, and thus the consumption, of cigarettes by minors would be advanced as well.

The City has a substantial interest both in promoting compliance with § 404 and in advancing the public policy which underlies § 404. Therefore, the second prong of the *Central Hudson* test is satisfied.

2. The Third Prong: Does Ordinance 307 directly advance this substantial interest?

In *Edenfield* v. *Fane*, — U.S. —, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (holding that a Florida ordinance prohibiting Certified Public Accountants from in-person solicitation was an unconstitutional restraint on free speech), the Supreme Court elaborated upon the third prong of the constitutionality test for restrictions on commercial speech first set forth in Central Hudson. The Court stated that to withstand a First Amendment challenge, the state must demonstrate that "its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end." *Id.* at —, 113 S.Ct. at 1799. The Court also cautioned that the state's burden

> is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.

Id. at —, 113 S.Ct. at 1800.

The City maintains that the Court's Edenfield ruling does not modify the "intermediate level"[2] of scrutiny that had been

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[2] The Court reaffirmed its view that an intermediate level of scrutiny is applicable to First Amendment challenges to restrictions on commercial speech in Discovery Network where the Court required a more searching inquiry than rational basis review, but one less rigorous than least restrictive means. *Cincinnati* v.

applicable to challenges to restraints on commercial speech prior to *Edenfield* and that the same deference should be afforded the legislature that had been prior to *Edenfield*. An example of this judicial deference is found in the deference the Supreme Court has given a legislature's judgment that a link exists between billboards and traffic safety in repeated litigation over the placement of billboards. In *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), for example, the Court upheld San Diego's ban on off-site billboard advertising under the *Central Hudson* test. Although the record failed to establish a connection between billboards and traffic safety, the Court nonetheless upheld the restriction, stating that "[w]e likewise hesitate to disagree with the accumulated, common sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Id.* at 509, 101 S.Ct. at 2893 (footnote omitted).

The City urges the Court to defer to the legislative judgment that the connection between advertising and consumption is "self-evident" as the Supreme Court and lower courts had done prior to *Edenfield*. *See, e.g., Posadas de Puerto Rico Assoc.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 342, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986) ("The Puerto Rico Legislature obviously believed that advertising of casino gambling . . . would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one."); *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353 ("There is an immediate connection between advertising and demand for electricity. *Central Hudson* would not contest the advertising ban unless it believed that promotion would increase its sales."); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir.1983), *rev'd on other grounds sub nom., Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984) (Deferring to a legislative judgment linking alcohol advertising and consumption in upholding a prohibition against the broadcasting of advertisements for alcoholic beverages); *Dunagin* v. *Oxford*, 718 F.2d 738 (5th

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Discovery Network, Inc., --- U.S. ----, ---- n.13, 113 S.Ct. 1505, 1510 n.13, 123 L.Ed.2d 99 (1993).

Cir.1983), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3554, 82 L.Ed.2d 855 (1984) ("We hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban [on local liquor advertising], whether or not 'concrete scientific evidence' exists to that effect.").

Penn asserts that the Supreme Court's opinion in *Edenfield* has altered the level of scrutiny with which the Court is to examine a restraint on commercial speech. According to Penn, the Court should no longer apply an intermediate level of scrutiny. Penn asserts that after *Edenfield*, the City must satisfy "a serious and substantial burden of proof . . . that requires a fact-intensive inquiry that cannot be resolved through summary judgment." Plaintiff's Opp. to Def. Motion for Summ. Judg., at 25. Under this more difficult test, Penn asserts that it is inappropriate for this Court to accept the judicially-recognized proposition that advertising increases consumption as sufficient to sustain the City's burden and thus that it is inappropriate for this Court to grant the City's motion for summary judgment.

Penn raised substantially the same argument in *Anheuser Busch, Inc. and Penn Advertising of Baltimore, Inc.* v. *Mayor and City Council of Baltimore*, 855 F.Supp. 811 (D.Md.1994) (hereinafter *Penn I*). *Penn I* involved a First Amendment challenge to an ordinance very similar to Ordinance 307, except the ordinance challenged in *Penn I* prohibited alcohol advertising on billboards located in areas that would cause minors to be exposed to such advertising, whereas Ordinance 307 prohibits cigarette advertising on similarly-situated billboards. Judge Hargrove in *Penn I* did not accept the increased level of scrutiny for commercial speech restrictions which Penn asserted makes it inappropriate for the Courts to defer to a legislative judgment that advertising increases consumption. Rather, Judge Hargrove concluded that *Edenfield* did not change the requisite level of scrutiny:

> This Court . . . is unable to find any language in *Edenfield* that specifies the precise level of scrutiny with which this Court must review the Ordinance. *Edenfield* requires only that the government "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

Penn I, 855 F.Supp. at 815 (quoting *Edenfield*, --- U.S. at ---, 113 S.Ct. at 1800). This Court finds Judge Hargrove's analysis persuasive.

In *Penn I*, Judge Hargrove relied on *United States* v. *Edge Broadcasting Co.*, --- U.S. ---, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), a Supreme Court decision that followed soon after the Court's *Edenfield* decision, to support his position. In *Edge*, the Court upheld a federal statute prohibiting radio broadcast of lottery advertising by licensees located in non-lottery states against a First Amendment challenge to restrictions on commercial speech. In doing so, the Court "affirmed the role of judicial deference to legislative judgments in the area of commercial speech." *Penn I*, 855 F.Supp. at 815. The Court acknowledged the propriety of judicial deference to a legislative judgment that advertising increases consumption, stating that

> Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments. Here, as in *Posadas de Puerto Rico*, the Government obviously legislated on the premise that the advertising of gambling serves to increase the demand for the advertised product. Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling.

Edge, --- U.S. at ---, 113 S.Ct. at 2707.

Penn cites *Cal-Almond, Inc.* v. *United States Dep't of Agric.*, 14 F.3d 429 (9th Cir.1993) (holding that a governmental program that required individual almond growers to pay assessments for government-sponsored advertising was an unconstitutional restriction on commercial speech), *Coors Co.* v. *Bentsen*, 2 F.3d 355 (10th Cir.1993) and *Hornell Brewing Co.* v. *Brady*, 819 F.Supp. 1227 (E.D.N.Y.1993), in support of their assertion that the federal courts that have recently been presented with this issue have refused to follow the judicially-recognized principle that advertising increases consumption. Despite Penn's contentions, none of these cases actually support this proposition.

Judge Hargrove in *Penn I* actually cited *Cal-Almond* in support of the opposing position. In *Cal-Almond*, the Ninth Circuit considered the impact of the recent Supreme Court decisions

involving commercial speech on *Central Hudson* and concluded that it was still appropriate to adhere to the judicial recognition that a link exists between advertising and consumption. While acknowledging the Court's general instruction in *Edenfield* to evaluate the government's interests and the harms it seeks to avoid, the Court noted that "the Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised . . . . Therefore, we may reasonably assume that the Board's promotional efforts have some positive effect on almond demand." *Cal-Almond*, 14 F.3d at 439 (citations omitted).

While the Court went on to complete a more searching inquiry into the success of the Board's advertising efforts, the Court did so because the issue presented was not merely whether the Board's advertising efforts had increased demand. Rather, the relevant issue, whether "the generic Board promotion . . . sells almonds more effectively than the specific, targeted marketing efforts of individual handlers," required the Court to "compare it [the increase in demand caused by the Board's promotional campaign] to a situation where handlers spent their assessments on their own marketing." *Id.* at 439.

In *Coors*, the Tenth Circuit held that a regulation prohibiting statements of alcohol content on malt beverage labels violated the First Amendment. The government contended that the purpose of the regulation was to prevent strength wars among competing manufacturers. In invalidating the regulation, the Court noted that "[t]he critical question is whether the evidence shows the required relationship between the labeling prohibition that Coors is challenging and the threat of strength wars." *Coors*, 2 F.3d at 358. The Court found that

> the Government has offered no evidence to indicate that the appearance of factual statements of alcohol content on malt beverage labels would lead to strength wars . . . . Instead, it has offered only inferential arguments that are based on mere speculation and conjecture.

Id. at 359. Judge Hargrove noted that the link the government sought to establish in *Coors* "is, at best, tenuous." *Penn I*, 855 F.Supp. at 817.

In *Hornell*, the Court held that legislation prohibiting the use of the name "Crazy Horse" on alcoholic products was in violation of the First Amendment's protection of commercial speech because it did not directly advance the government's substantial interest in preventing the enhanced appeal of alcohol use among Native Americans. The government's argument was "based on the premise that the use of the name Crazy Horse will stimulate demand for malt liquor in Native American Communities." *Hornell*, 819 F.Supp. at 1235. While the Court refused to defer to the legislature's judgment and accept the government's premise without evidence to support it, the Court was careful to distinguish *Hornell* from *Posadas*, noting:

> Furthermore, in *Posadas*, the Court was able to defer to the legislature on the basis of precedent . . . that established the causal relationship between advertising and consumption . . . . Here, there is no comparable precedent that suggests, let alone establishes, an immediate connection between the use of one specific Native American name, Crazy Horse, and increased consumption of alcohol by Native Americans. The government asks the Court to make a leap of faith and logic on this point.

Id. at 1237.

The situations presented in *Cal-Almond*, *Coors* and *Hornell* differ greatly from the one currently before this Court. In *Cal-Almond*, the government sought to show, not merely that advertising increases consumption, but that "a government agency is better at marketing [almonds] than an individual business person." *Cal-Almond*, 14 F.3d at 439. In *Coors*, the government sought to establish a link between factual statements of alcohol content on malt beverage labels and strength wars. In *Hornell*, the government sought to establish a link between use of the name Crazy Horse and enhanced demand for malt liquor in Native American Communities. In all three cases, the government sought to establish a proposition that was, at best, tenuous. In all three cases the government asked the Court to accept mere speculation and conjecture as sufficient to satisfy their *Central Hudson* burden of demonstrating that the regulation in question directly advanced the asserted substantial governmental interest. In the case currently before this Court, the City urges this Court to accept the

proposition that advertising increases consumption. This link is "more immediately apparent," *Penn I*, 855 F.Supp. at 817, and is a long-standing, judicially-recognized proposition. *See, e.g., Posadas*, 478 U.S. at 342, 106 S.Ct. at 2977; *Central Hudson*, 447 U.S. at 569, 100 S.Ct. at 2353; *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir.1983), *rev'd on other grounds sub nom., Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984); *Dunagin*, 718 F.2d 738; *Edge*, --- U.S. ---, 113 S.Ct. 2696.

Penn also asserts that it is inappropriate to accept the judicially-recognized proposition that advertising increases consumption because the purpose of cigarette advertising is not to increase overall consumption but merely to increase the advertiser's market share of an already established pool of smokers. Penn also raised this argument in *Penn I* as it relates to alcohol. Judge Hargrove did not find Penn's position persuasive and adequately addressed their argument in *Penn I*. His reasoning regarding the market share argument is as applicable to cigarette sales as it is to alcohol sales.

> It is beyond our ability to understand why huge sums of money would be devoted to the promotion of sales of liquor without expected results, or continue without realized results. No doubt competitors want to retain and expand their share of the market, but what business person stops short with competitive comparisons? It is total sales, profits, that pay the advertiser; and dollars go into advertising only if they produce sales. Money talks: it talks to the young and the old about what counts in the marketplace of our society.

Penn I, 855 F.Supp. at 818 (quoting *Dunagin*, 718 F.2d at 749).

This Court holds that it remains appropriate in the wake of *Edenfield* to accept the judicially-recognized proposition that advertising increases consumption. Furthermore, if advertising increases consumption among the general population, it is also reasonable to accept the proposition that advertising increases consumption among youths. If anything, this statement may be more applicable to the youthful population than to the adult population due to the impressionable nature of youngsters.

As the Supreme Court reasoned in *Edge*, an opinion in which the Court accepted the legislative judgment that advertising increases consumption,

> If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the government may be said to advance its purpose by substantially reducing lottery advertising . . . . In our view, the restriction . . . directly advances the governmental interest within the meaning of *Central Hudson*.

Edge, --- U.S. at ----, 113 S.Ct. at 2707. Similarly, if there is an immediate connection between advertising and demand among minors, as has already been established, and Ordinance 307 decreases cigarette advertising, as it does, it stands to reason that the demand for cigarettes among minors will decrease. If the demand for cigarettes among minors decreases, the City's policy of preventing transactions which violate § 404 and discouraging the purchase and consumption of cigarettes by minors is advanced. Thus, Ordinance 307 does directly advance the City's asserted substantial interest and passes the third prong of the *Central Hudson* test.

3. The Fourth Prong: Is Ordinance 307 narrowly tailored to serve the City's asserted substantial interest?

In *Board of Trustees* v. *Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989), the Supreme Court explained that the fourth prong of the *Central Hudson* test requires only a reasonable fit between the regulation and the interest it is meant to serve for the challenged regulation to pass constitutional muster:

> What our decisions require is a "fit" between the legislature's ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental

> decisionmakers to judge what manner of regulation may best be employed.

Fox, 492 U.S. at 480, 109 S.Ct. at 3035 (internal quotations and citations omitted).

In declining to impose a "least restrictive means" requirement, the Court noted that in doing so it was taking "account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires" and providing "the Legislative and Executive Branches needed leeway in a field (commercial speech) 'traditionally subject to government regulation.'" *Id.* at 481, 109 S.Ct. at 3035 (quoting *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 455-56, 98 S.Ct. at 1918-19). In *Penn I*, Judge Hargrove explained that "[a]n intermediate level of scrutiny thus recognizes the latitude that decisionmakers require to address widespread social problems." *Penn I*, 855 F.Supp. at 819.

In *Edenfield*, the Court further elaborated upon why a reasonable fit requirement is appropriate. The Court reasoned:

> Commercial speech . . . is linked inextricably with the commercial arrangement that it proposes, . . . so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself. . . . For this reason, laws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner in order to survive First Amendment scrutiny.

Edenfield, — U.S. at —, 113 S.Ct. at 1798.

Penn asserts, as it did in *Penn I*, that Ordinance 307 is not narrowly tailored to serve the City's substantial interest in preventing the purchase and consumption of cigarettes by minors. Penn argues that Ordinance 307 is underinclusive because it prohibits only a small percentage of total advertisements for the product, leaving many other mediums, such as newspapers, magazines, signs inside stores which sell cigarettes, advertisements on the storefronts of businesses that sell cigarettes and on the inside and outside of MTA busses, unrestricted. Penn cites *City of Cincinnati* v. *Discovery Network, Inc.*, — U.S. —, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), in support of this contention.

In *Discovery Network*, the Supreme Court invalidated a city ordinance because no reasonable fit existed between the regulation and the city's asserted interest. Motivated by its concern for safety and aesthetics, the city used a pre-existing ordinance, which prohibited distribution of "commercial handbills" on public property, to remove 62 newsracks containing commercial handbills while leaving between 1,500 and 2,000 similar newsracks that contained noncommercial speech untouched. The Court held that there was no reasonable fit because the city offered no legitimate justification for distinguishing between the newsracks that contained commercial speech and those that contained noncommercial speech. As the Court explained,

> the city's primary concern . . . is with the aggregate number of newsracks on its streets. On that score, however, all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault.

Discovery Network, — U.S. at —, 113 S.Ct. at 1514. The only justification the city offered for this differentiation between newsracks was the fact that commercial speech receives a somewhat lower level of First Amendment protection than noncommercial speech. The city argued that this fact alone allows the prohibition of commercial speech while allowing noncommercial speech that is equally harmful to the city's asserted interest to remain untouched. In response to this argument, the Supreme Court stated:

> the city contends that safety concerns and visual blight may be addressed by a prohibition that distinguishes between commercial and noncommercial publications that are equally responsible for those problems. In Bolger, however, in rejecting 'offensive' speech, [we] specifically declined to recognize a distinction between commercial and noncommercial speech that would render this interest a sufficient justification for a prohibition of commercial speech.

Discovery Network, — U.S. at —, 113 S.Ct. at 1515 (internal quotations and citations omitted). The Court further elaborated on this point, stating: "the distinction bears no relationship whatsoever to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly

legitimate interests." *Discovery Network*, --- U.S. at ----, 113 S.Ct. at 1514.

In the instant case, there are legitimate justifications related to the city's substantial interest for distinguishing between billboards and the other types of mediums which the ordinance does not affect. The distinction between the permitted and prohibited forms of advertising rests on the effect that different mediums have on adolescents.

Judge Hargrove in *Penn I*, in describing the very same billboards that are the subject of this litigation, stated:

> a billboard is a constant fixture in a neighborhood. It looms over children every day while they walk to school, and every time they play in their neighborhood, thus forming an inescapable part of their daily life . . . . Furthermore, despite protestations to the contrary, the reality is that billboard advertisements for alcoholic beverages focus on depressed inner-city neighborhoods. Billboards are conspicuously absent from more affluent communities. They present a stark contrast to adolescents between the lifestyle depicted in the advertisement and the actual neighborhood surrounding them thereby enhancing the attractiveness of the advertised product.

Penn I, 855 F.Supp. at 822. Judge Hargrove's insights are equally applicable to cigarette advertising on these same billboards. Relying on *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), which held that a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives was in violation of the First Amendment, Penn argues that the City "cannot deprive adults of commercial information concerning cigarettes simply because the City believes that minors should not be exposed to such information." Plaintiff's Opp. to Def. Motion for Summ. Judg., at 44.

Penn advanced the same argument as it relates to alcohol advertisements in *Penn I*. Judge Hargrove concluded in *Penn I* that Penn's argument had no merit. This Court finds his reasoning persuasive. Judge Hargrove addressed Penn's argument by noting that:

> In *Bolger*, however, the Supreme Court recognized that the governmental interest in protecting children may in some

> instances justify special treatment. Citing *FCC* v. *Pacifica Foundation*, 438 U.S. 726 [98 S.Ct. 3026, 57 L.Ed.2d 1073] (1978), which upheld a restriction on broadcasting in order to protect children, the Court emphasized the narrowness of the holding based on the uniquely pervasive and accessible nature of the broadcasting medium. In distinguishing *Bolger* from *Pacifica*, the Court found that the receipt of mail is far less intrusive and uncontrollable than broadcasting. The Court noted that parents already exercise substantial control over mail once it enters their mailboxes and are entitled under a federal statute to limit their receipt of sexually provocative material. Therefore, an additional regulation prohibiting unsolicited advertisements on contraceptives was unnecessary.

Penn I, 855 F.Supp. at 820 (internal quotations and citations omitted).

Judge Hargrove went on to note that "As in the broadcasting context, parents are similarly unable to control their children's exposure to outdoor billboard advertisements." *Id.* at 820. As the Supreme Court explained in *Packer*,

> There is a difference which justifies the classification between display advertising and that in periodicals or newspapers: 'Billboards, street car signs, and placards and such are in a class by themselves . . . . Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed . . . .' The legislature may recognize degrees of evil and adapt its legislation accordingly.

Packer Corp. v. *Utah*, 285 U.S. 105, 110, 52 S.Ct. 273, 274-75, 76 L.Ed. 643 (1932) (citing *State* v. *Packer Corp.*, 77 Utah 500, 297 P. 1013, 1019 (1931)). Thus, there is a legitimate justification relating to the City's asserted interest for differentiating billboards from other types of media which are less accessible to children and to which parent's can control their children's exposure, media such as newspapers, magazines and signs inside stores which sell cigarettes.

There is also a legitimate reason in line with the City's asserted interest for differentiating between the restricted billboards and advertisements on the storefronts of businesses that sell cigarettes. The Supreme Court addressed this issue in *Discovery Network* in their discussion of *Metromedia*. The Court explained that "the offsite-onsite distinction involved disparate treatment of two types of commercial speech. Only the onsite signs served both the commercial and public interest in guiding potential visitors to their intended destinations." *Discovery Network*, --- U.S. at ---- n. 20, 113 S.Ct. at 1514 n.20 (internal quotations and citations omitted). In rejecting a similar argument, the Fifth Circuit in *Dunagin* stated "the restrictions permit certain types of informational advertising of use to the consumer . . ., but bar those displays that it believes will encourage excess consumption." *Dunagin*, 718 F.2d at 751. The reasoning of the Supreme Court and the Fifth Circuit also applies to the case now before this Court. The City seeks to prevent the exposure of minors to advertisements that will increase their demand for cigarettes. They do not seek to hide the locations of establishments that sell cigarettes, thereby placing obstacles in the way of adult smokers seeking to purchase cigarettes and harming local businesses. The restriction on billboard advertisements substantially promotes the City's goal by banning a particularly large and attention-attracting medium that the City believes will stimulate demand among minors. Ordinance 307 accomplishes this while not unnecessarily interfering with local businesses or adult smokers by prohibiting the smaller on-site advertisements that likely have less influence on youngsters and serve a commercial and public interest by informing adult smokers of where cigarettes may be purchased.

As the Supreme Court stated in *Edge*:

> Nor do we require that the government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated.

Edge, — U.S. at —, 113 S.Ct. at 2707. Therefore, this Court would not find Ordinance 307 unconstitutional even if several of the unrestricted mediums of which Penn complains were not easily distinguishable from billboards because the City need not make progress on all fronts before attempting to make progress on any. Furthermore, the government has made progress on other fronts more similar to billboard advertising than the unrestricted mediums. This can be seen in the Public Health Cigarette Smoking Act of 1969, 15 U.S.C.A. § 1335 (1970), which prohibits cigarette advertising on any medium of electronic communication, and in Executive Order No. 01.01.1993.33 signed by Governor Schaefer on December 20, 1993, Md.Reg., Vol. 21, Issue 1, pg. 14 (Jan. 7, 1994 issue), which prohibits the renewal of contracts for cigarette advertisements on MTA busses. In banning cigarette advertisements on television, radio and MTA busses, these restrictions place prohibitions on similar types of mediums to the billboards restricted by Ordinance 307. All of the restricted mediums are unusually accessible to and influential on minors and parents lack control over their children's exposure to each.

Penn also claims that Ordinance 307 is underinclusive because the restrictions on billboard advertising will only lead to an increase in cigarette advertising in the mediums remaining unrestricted, thus frustrating the City's asserted purpose of decreasing the exposure of minors to cigarette advertising. The Court is not persuaded by this argument. Penn has given no reason to accept this proposition beyond its unsubstantiated assertion. Even if the Court were to accept Penn's proposition, the City's asserted substantial interest would still be forwarded unless the advertising budget of tobacco companies shifted its focus from billboards to unrestricted mediums that are as accessible to and influential on minors as billboards and to which parents similarly have little control over the exposure of

their children. With the bans on advertisement in the electronic media and on MTA busses, it seems most improbable that such a hypothesized shift would increase advertising in such areas.

Penn further argues that Ordinance 307 fails to satisfy the fourth prong of the *Central Hudson* test because alternative, less burdensome means exist to decrease the purchase and consumption of cigarettes by minors, such as increased enforcement of the existing prohibition of cigarette sales to minors. But as Judge Hargrove stated in *Penn I*:

> The mere suggestion of alternatives, however, does not conclusively establish that the City's chosen means are not narrowly tailored; a reasonable fit is all that is necessary: 'A judge need not agree with the decisionmaker as to the most appropriate method for promoting a governmental interest; as long as there is a reasonable fit between the restriction and the interest served, the manner of regulation is left to the decisionmaker.' In other words, although consideration of alternatives is an element of 'reasonable fit,' it is not dispositive.

Penn I, 855 F.Supp. at 819 (quoting *Destination Ventures* v. *F.C.C.*, 844 F.Supp. 632, 638 (D.Or.1994) (citations omitted)). This Court holds that the City's chosen means are narrowly tailored to advance the City's asserted interest of decreasing the exposure of minors to stimuli that would encourage them to purchase cigarettes, thereby decreasing the number of illegal transactions and discouraging the purchase and consumption of cigarettes by minors. The City has limited the ban on cigarette advertising to billboards in neighborhoods in which children would typically be found such as the areas in which they live, attend school and church and recreate. In those residential and business zones in which children would not normally be found, the ordinance has no effect.[3] Ordinance 307 is also narrowly tailored in that it applies only to a narrow medium, billboards, which are particularly problematic in that they are easily accessible to children and parents lack control over their children's exposure to such advertisements, while leaving

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[3] The eleventh exception to Ordinance 307 makes the ordinance inapplicable in the zoned areas described above.

other mediums, such as newspapers, magazines, and signs inside licensed premises, which do not cause these specific problems, unrestricted. Also left unrestricted are signs outside premises which sell cigarettes, thus allowing licensed distributors of cigarettes to identify themselves and their wares. For all these reasons, this Court holds that Ordinance 307 satisfies the fourth prong of the *Central Hudson* test.

Having determined that Ordinance 307 has satisfied all four prongs of the *Central Hudson* test, this Court holds that Ordinance 307 does not violate the First Amendment. Accordingly, this Court will grant the City's motion for summary judgment on this claim.

B. Ordinance 307 is not pre-empted by the Federal Cigarette Labeling and Advertising Act

1. Pre-emption Analysis: Generally

Article VI of the Constitution provides that the laws of the United States "shall be the supreme law of the land; any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Thus, since the Supreme Court's decision in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819), it has been settled that state law that conflicts with Federal law is "without effect." *Maryland* v. *Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2128, 68 L.Ed.2d 576 (1981). Pre-emption analysis "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Accordingly, "'the purpose of Congress is the ultimate touchstone'" of pre-emption analysis. *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443 (1978) (quoting *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 222, 11 L.Ed.2d 179 (1963)).

The Supreme Court further elaborated upon the proper approach to issues arising under the Supremacy clause in its opinion in *Cipollone* v. *Liggett Group, Inc.*:

> Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law

> is preempted if that law actually conflicts with federal law or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.

Cipollone v. *Liggett Group, Inc.*, --- U.S. ----, ----, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (internal quotations and citations omitted).

2. History of the Federal Cigarette Labeling and Advertising Act

The Surgeon General convened an advisory committee in 1962 to examine the issue of whether there was a link between smoking and illness. In 1964, the advisory committee issued its report, which stated as its central conclusion: "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." U.S. Dept. of Health, Educ. and Welfare, U.S. Surgeon General's Advisory Comm., Smoking and Health 33 (1964). Following this report, the Federal Trade Commission (FTC) and several states separately moved to regulate the advertising and labeling of cigarettes. *See, e.g.*, 29 Fed.Reg. 8325 (1964); 1965 N.Y.Laws, ch. 470; *see also* 111 Cong.Rec. 13900-13902 (1965) (statement of Sen. Moss).

This activity led Congress to enact the Federal Cigarette Labeling and Advertising Act (FCLAA) in July 1965. Pub.L. 89-92 (1965), 79 Stat. 282, as amended, 15 U.S.C. §§ 1331-1340 (hereinafter the "1965 Act"). In Section 2, the 1965 Act declared its competing dual purposes: (1) adequately informing the public that cigarette smoking may be hazardous to your health, and (2) protecting the national economy from the burden imposed by diverse, nonuniform and confusing cigarette labeling and advertising regulations. Pub.L. 89-92, § 2 (1965), 79 Stat. 282, as amended, 15 U.S.C. § 1331(2). In furtherance of its first purpose, the 1965 Act required the warning statement "Caution: Cigarette Smoking May Be Hazardous to Your Health" on cigarette packages. Pub.L. 89-92, § 4 (1965), 79 Stat. 283. In recognition of its second purpose, the 1965 Act explicitly preempted FTC and state regulation by specifying that "no statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package," and that until July

1, 1969, "no statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *Id.* at §§ 5, 10.

The *Public Health Cigarette Smoking Act of 1969*, Pub.L. 91-222, 84 Stat. 87, as amended, 15 U.S.C. §§ 1331-1340, (hereinafter the "1969 Act"), strengthened the warning label, changing the warning message to "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health," and prohibited cigarette advertising on television and radio. In addition, the pre-emption clause of the statute was changed to its present form: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." Pub.L. 89-92, § 5(b) (1965), 79 Stat. 283 (codified at 15 U.S.C. § 1334(b)).

Federal cigarette labeling and advertising regulation reached its present form through the *Comprehensive Smoking Education Act*, Pub.L. 98-474, 98 Stat. 2200 (1984) (codified at 15 U.S.C. § 1331-1341) [hereinafter the "1984 Act"]. This act changed the warning format to a rotation of four different warning messages and extended the warning requirement to cigarette advertisements.

3. Analysis

The Supreme Court first addressed the question of the pre-emptive reach of the FCLAA in *Cipollone* v. *Liggett Group, Inc.*, --- U.S. ---, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). In *Cipollone*, the son of Rose Cipollone, who began smoking in 1942 and died of lung cancer in 1984, attempted to recover damages for her death from the defendant cigarette manufacturers on the basis of several state common law claims. Cipollone claimed that the defendants had breached express warranties contained in their advertising, failed to warn consumers about the hazards of smoking, fraudulently misrepresented those hazards to consumers and conspired to deprive the public of medical and scientific information about smoking. Defendants argued that the state law claims were pre-empted by the FCLAA. The Court held that the 1965 Act did not pre-empt any of Cipollone's claims. The plurality

held that the 1969 Act pre-empted Cipollone's claims that were based on a failure to warn and the neutralization of federally mandated warnings to the extent such claims relied on omissions or inclusions in the tobacco manufacturer's advertising while not pre-empting those claims that were based on express warranty, intentional fraud and misrepresentation, or conspiracy theories.

In order for the *Cipollone* Court to rule, the Court necessarily undertook a thorough analysis of the pre-emptive reach of the 1965 and 1969 Acts. While the 1969 Act broadened the pre-emptive reach of the 1965 Act, *Cipollone*, at ---- - ----, 112 S.Ct. at 2619-21, the 1984 Act did not alter the 1969 Act with respect to pre-emption. Thus, the pre-emptive scope of the FCLAA has not changed since the 1969 Act. Therefore, the Court's discussion of the pre-emptive scope of the 1969 Act establishes the relevant standard of inquiry for the instant case. This is the only portion of the Court's analysis that is germane to the instant case.

In arriving at its conclusions concerning whether Cipollone's claims were pre-empted, the Court held that "the pre-emptive scope of the . . . 1969 Act is governed entirely by the express language in § 5 of [the] Act." Id. at ----, 112 S.Ct. at 2618. The Court explained:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the . . . [Act] offer no cause to look beyond § 5 of [the] Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections.

Id. at ----, 112 S.Ct. at 2618.

The Court further elaborated on the standards for considering the pre-emptive power of § 5(b) of the 1969 Act: "we must fairly

but—in light of the strong presumption against pre-emption—narrowly construe the precise language of § 5(b) and we must look to each of petitioner's common law claims to determine whether it is in fact pre-empted." *Id.* at ---, 112 S.Ct. at 2621. Justice Stevens, with the support of a plurality of the Court, explained that the applicable inquiry in determining whether a claim is pre-empted by the 1969 Act is

> whether the legal duty that is the predicate of the common law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law . . . with respect to . . . advertising or promotion,' giving that clause a fair but narrow reading. . . . [E]ach phrase within that clause limits the universe of common law claims preempted by the statute.

Id. at ---, 112 S.Ct. at 2621.

Now that the applicable standards of inquiry into the pre-emptive scope of the 1969 Act, as dictated by the Supreme Court in *Cipollone*, have been established, this Court may now analyze the claims before it. Penn claims that Ordinance 307, a prohibition imposed under State law which regards advertising, is based on smoking and health and is therefore pre-empted by the FCLAA. Penn arrives at this conclusion on three bases. First, Penn argues that Article 27, § 404 is based on smoking and health because the precursor to § 404, an 1886 Maryland law banning sale of cigarettes to minors, recites that it is an "AN ACT TO PROTECT THE HEALTH AND MORALS OF MINORS . . . ." The City asserts that Ordinance 307 was promulgated with the purpose of further effectuating § 404. Penn argues that because § 404 is based on smoking and health, an ordinance meant to further § 404 is also based on smoking and health.

Even if this Court were to accept Penn's assertion that § 404 is based on smoking and health,[4] this Court would still not accept

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[4] The language of the preamble to the 1886 Act may well be nothing more than a statement of legislative authority. The "health and morals" formulation is one which is routinely used by legislatures in invoking state police powers. There is no legislative history available to determine whether health concerns were in fact

Penn's argument. The underlying purpose of § 404 is irrelevant to this analysis. The validity of § 404 has not been challenged, nor could it be challenged. It is certainly within the City's power to pass a law meant to effectuate a valid State law.

It is clear that Ordinance 307 is such a law. The purpose of Ordinance 307 is to further effectuate § 404, a valid State law. The Preamble to Ordinance 307 cites § 404 as the impetus for its promulgation along with abundant statistics concerning the prevalence of underage smoking to demonstrate the necessity of Ordinance 307 as a means to increase the effectiveness of § 404. Furthermore, Ordinance 307 is obviously designed to accomplish this goal. The City has limited the ban on cigarette advertising to billboards in neighborhoods in which children would typically be found such as the areas in which they live, attend school and church and recreate. In those residential and business zones in which children would not normally be found, the ordinance has no effect.[5] Ordinance 307 is also narrowly tailored in that it applies only to a narrow medium, billboards, which are particularly problematic in that they are easily accessible to children and parents lack control over their children's exposure to such advertisements. Ordinance 307 has no effect upon other mediums which do not cause these specific problems, such as newspapers, magazines, and signs inside licensed premises. Ordinance 307 is clearly aimed at the illegal sale of cigarettes to minors. Its purpose is to effectuate § 404 and, therefore, Ordinance 307 is not "'based on smoking and health . . .' giving that clause a fair but narrow reading." Id. at ---, 112 S.Ct. at 2621.

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an issue in first enacting the ban on sale of cigarettes to minors. It is clear, however, that "[a]lthough physicians had suspected a link between smoking and illness for centuries, the first medical studies of that connection did not appear until the 1920's. *Cipollone* at ---, 112 S.Ct. at 2615 (citing U.S. Dept. of Health and Human Services, Report of the Surgeon General, Reducing the Health Consequences of Smoking: 25 years of Progress 5 (1989).

[5] See note 3.

This holding is in line with the holding of the Supreme Court in *Cipollone*. In *Cipollone*, the Court held that Cipollone's claims of intentional fraud and misrepresentation were not pre-empted because they were not "'based on smoking and health' but rather on a more general obligation— the duty not to deceive." *Id.* at ----, 112 S.Ct. at 2624. The Court further held that Cipollone's conspiracy claim was not pre-empted because "this duty . . . is not a prohibition 'based on smoking and health' as that phrase is properly construed," *Id.* at ----, 112 S.Ct. at 2624, but, rather, it is based on a more general duty—the duty not to conspire to commit fraud. Similarly, Ordinance 307 is not "based on smoking and health" but rather on a more general obligation—the duty not to advertise products which are illegal for sale to minors on a medium which has undue influence on minors, or, in other words, the duty not to unduly encourage illegal transactions. This more general obligation underlying Ordinance 307 is also reflected in Baltimore Ordinance 262 which limits billboard advertisements for alcoholic beverages.

The Court reasoned that this interpretation of the phrase "smoking and health" was appropriate for two reasons: (1) "Congress intended the phrase 'relating to smoking and health' to be construed narrowly, so as not to proscribe the regulation of deceptive advertising;" *Id.* at ----, 112 S.Ct. at 2624, and (2) this interpretation of "based on smoking and health"

> is wholly consistent with the purposes of the 1969 Act. State law prohibitions on false statements of material fact do not create 'diverse, nonuniform, and confusing' standards. Unlike state law obligations concerning the warning necessary to render a product 'reasonably safe,' state law proscriptions on intentional fraud rely only on a single, uniform standard: falsity.

Id. at —, 112 S.Ct. at 2624. Thus, the Court concluded that "the phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements." *Id.* at —, 112 S.Ct. at 2624. Accordingly, the Court held that Cipollone's claim was not pre-empted. The Court went on to note that this reasoning was equally applicable to Cipollone's conspiracy claims and held that these claims were also not pre-empted.

Likewise, this interpretation of the phrase "smoking and health" is appropriate in the instant case for the same reasons. A narrow construction of the phrase "smoking and health" is appropriate because Congress did not intend to interfere with a State's regulation of tobacco sales to minors. The Report of the United States Senate which accompanied the enactment of the FCLAA makes that point clear: "[Section 1334] would in no way affect the power of any State . . . with respect to . . . the sale of cigarettes to minors." S.Rep. No. 91-566, 91st Cong., 1st Sess. 12 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2663. Moreover, such an interpretation is consistent with the purposes of the 1969 Act. Ordinance 307 does not create "diverse, nonuniform, and confusing" standards and relies on only a single, uniform standard: illegality.

The instant case differs from the claims that the *Cipollone* Court did find pre-empted. The Court held that Cipollone's failure to warn and neutralization of federally mandated warnings claims were pre-empted to the extent that they required "a showing that [the tobacco manufacturer's] post-1969 advertising . . . should have included additional, or more clearly stated, warnings." *Cipollone*, — U.S. at —, 112 S.Ct. at 2621. Ordinance 307 does not require any additions or alterations in the federally-mandated warning labels. Therefore, Ordinance 307 is distinguishable from Cipollone's pre-empted failure to warn and neutralization of federally mandated warnings claims.

The Court also found the first of Cipollone's fraudulent misrepresentation claims to be pre-empted. This claim was based on a state-law prohibition against statements in advertising and promotional materials that tended to minimize the health hazards associated with smoking. The Court held that the state prohibition was pre-empted because it was based on smoking and health and regarded advertising. Thus, Cipollone's claim based on this state prohibition could not stand. The Ordinance challenged in the present action, Ordinance 307, was promulgated to effectuate § 404. Unlike the state-law prohibition in *Cipollone*, the validity of § 404 is not challenged by Penn. Thus, Cipollone's claim is not analogous to the instant case.

Penn's second argument in support of its assertion that Ordinance 307 is "based on smoking and health" is that, regardless

of whether § 404 was "based on smoking and health," the true impetus behind the promulgation of Ordinance 307 was smoking and health concerns.

> Contrary to Defendant's contentions, concerns about smoking and health were, in fact, in the forefront of the City's concerns when it enacted Ordinance 307. Notwithstanding the City's efforts to obfuscate and camouflage those concerns, they none-the-less leaked out into the transcript of the City Council hearing on Ordinance 307. . . . Although apparently advised by their lawyers that if they abstained from saying the "H" word (health) they could successfully . . . not implicate the FCLAA pre-emption doctrine, the Chairman of the Hearing and the chief administrator of the city agency directly charged with protecting public health nevertheless let slip what everyone in the hearing room knew; that this cigarette advertising ban was based on concerns about smoking and health.

Plaintiff's Opp. to Def. Motion for Summ. Judg. at 11-12.

The "slips" Penn refers to occurred during the combined public hearings held on November 17, 1993 for Ordinances 307 and 262 before the City Council. The first "slip" Penn refers to was Chairman Anthony Ambridge's two statements that "These [Ordinances 307 and 262] will call into question several legal, health and aesthetic issues," Def.App. Ex. 6 p. 9, and "Federal and State governments have already determined that placing age restrictions on consumption of alcohol and tobacco products is in the public's health interest." Def.App. Ex. 6 p. 12. The second reference is to a letter from Dr. Peter Beilenson, the Commissioner of Health, that was received into the record by the City Council. In this letter, Dr. Beilenson wrote, "Not only is smoking a health hazard to the smoker . . . As we know, smoking is a health hazard to all in the immediate vicinity." Def.App. Ex. 6 p. 239.

Penn's suggestion that these comments change the purpose of Ordinance 307 is misguided. The City Council hearing process is an open one. Dozens of scientific experts, industry representatives, merchants, legal advisers and interested community members spoke their mind. The mention of "the 'H' word" at such a hearing could not change the purpose of the legislation in question from

that clearly stated in the law the legislature finally chose to adopt. As the Supreme Court observed in *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992),

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . . When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete. Id. at 1149 (internal quotations and citations omitted). The City clearly stated what its purpose was in promulgating Ordinance 307: to effectuate § 404. Therefore, this Court need look no further than the language of Ordinance 307. In *Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs*, --- U.S. ----, 113 S.Ct. 692, 121 L.Ed.2d 619 (1993), the Supreme Court stated "we find the text of the statute unambiguous on the point at issue; accordingly, we give no weight to a single reference by a single Senator during floor debate in the Senate." *Id.* at ----, 113 S.Ct. at 700. Likewise, in light of the clarity of the language the legislature chose to use in addressing the purpose of Ordinance 307 in its Preamble, this Court gives no weight to the statements of Chairman Ambridge and Dr. Beilenson.

The statements of Chairman Ambridge are irrelevant for yet another reason. The statements of Chairman Ambridge merely reflect his view as to the purpose of § 404, the prohibition against the sale of cigarettes to minors. But the purpose of § 404 is irrelevant to the present inquiry for the reasons discussed earlier. Therefore, Chairman Ambridge's remarks are irrelevant as well. And it certainly is no surprise that Dr. Beilenson, the Commissioner of Health, noted the potential health impact of a bill under consideration at a public forum for the discussion of the passage of that bill. In fact, it is expected that he address possible health impacts of ordinances under consideration. Thus, Dr. Beilenson's letter also does not change the purpose of the legislature in passing the statute.

Penn also attempts to impute a health motive to Ordinance 307 by directing this Court to the tenth paragraph of the seventh whereas clause of the Preamble to Ordinance 307: "Cigarettes are

a 'gateway' drug among Maryland students, *i.e.*, a substance often used by adolescents as a first drug which appears to 'open the door' for use of harder drugs at a later date." Penn asserts that the City's stated concern regarding cigarettes as a "gateway" drug can be nothing but a health concern and that, therefore, Ordinance 307 is "based on smoking and health." This argument is also not persuasive. Penn interprets this subsection of the Preamble as if it stands alone, separate from the remainder of Ordinance 307. This is an improper method of statutory construction. "[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole." Sutherland Stat Const § 46.05 (5th Ed). As established earlier, Ordinance 307 clearly states that its focus is illegality. In light of this, it is apparent that this subsection also refers to illegality: the illegal use of "harder drugs."

Penn relies heavily on *Vango Media, Inc.* v. *City of New York*, 829 F.Supp. 572 (S.D.N.Y.1993). This case concerned Vango's challenge of a New York City ordinance which required the display of one public health message pertaining to the health dangers of smoking for every four tobacco advertisements on certain property and facilities owned, operated or licensed by the City of New York, including taxicabs. But *Vango* substantially differs from the present case. The New York law required, as a condition of cigarette advertising, a different message regarding the health risks of smoking than the federally-mandated warning, thus bringing the statute into conflict with the second stated purpose of the FCLAA. As the district court noted in holding that the statute was pre-empted by the FCLAA, "Congress had in mind avoiding precisely the type of anti-smoking message requirement now before this Court. The Local Law creates a regulation directly related to advertising that is 'diverse, nonuniform, and confusing' vis a vis the federal legislation." *Id.* at 583 (quoting 15 U.S.C. § 1331 (1970)). Ordinance 307 does not require any message at all, let alone a message that conflicts with the one mandated by Congress.

This Court finds that Ordinance 307 is not "based on smoking and health." Rather, Ordinance 307 is clearly focused on illegality. Therefore, this Court holds that Ordinance 307 is not a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or

promotion of . . . cigarettes," and is not pre-empted by the FCLAA. Accordingly, this Court will grant the City's motion for summary judgment.

C. Ordinance 307 is not pre-empted by Maryland State Law

Penn next claims that Ordinance 307 is pre-empted by state law. Analogous to Federal law, "state law may pre-empt local law in one of three ways: (1) pre-emption by conflict, (2) express pre-emption, or (3) implied pre-emption." *Allied Vending* v. *Bowie*, 332 Md. 279, 631 A.2d 77 (1993). Penn argues that Ordinance 307 is invalid in that State law precludes it by the doctrine of implied pre-emption. The Court in *Allied Vending* elaborated upon this form of pre-emption, noting that:

> In *Sitnick*, we explained the theory of implied pre-emption: '[W]e wish it understood that there may be times when the legislature may so forcibly express its intent to occupy a specific field of regulation that the acceptance of the doctrine of pre-emption by occupation is compelled.'

Id. at 298, 631 A.2d 77 (quoting *Mayor of Baltimore* v. *Sitnick*, 254 Md. 303, 323, 255 A.2d 376, 385 (1969)). Penn asserts that the State of Maryland has so forcibly expressed its intent to occupy the field of cigarette sales regulation as to pre-empt any local legislation in this area. Penn next argues that because the purpose of Ordinance 307 is to effectuate § 404, a prohibition of the sale of cigarettes to minors, Ordinance 307 is pre-empted by State law. Even if this Court accepts the proposition that Ordinance 307 would be pre-empted if Maryland State law completely occupied the field of cigarette sales regulation, a precarious position at best,[6] this

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[6] This position is questionable because Ordinance 307 regulates advertising, not sales. Though its purpose is to forward § 404, a law regulating sales, it is unclear to this Court whether this purpose would place a zoning ordinance regulating the placement of billboards, an area traditionally within the City's power, within the scope of the field Penn asserts is pre-empted, the field of cigarette sales regulation. This Court need not reach a conclusion regarding this issue because it is unnecessary to its holding. Therefore, this Court will not travel farther down this road.

argument could not succeed because the State has not completely occupied that field. Penn relies principally on *Allied Vending* in attempting to establish this proposition.

Penn asserts that the Maryland Court of Appeals in *Allied Vending* held that the State of Maryland has completely occupied the field of cigarette sales regulation, thus pre-empting any local legislation in this area by implication. Penn has misread *Allied Vending*. The Court in *Allied Vending* emphatically held that "in light of the comprehensive state-licensing scheme for cigarette vending machines provided by Article 56, §§ 607 through 631," *Allied Vending*, 332 Md. at 300, 631 A.2d 77, the State has expressed its intent to completely occupy the field of the sale of cigarettes through vending machines. In conclusion, the Court stated:

> In short, through the enactment of Article 56, §§ 607 through 631, the General Assembly has manifested an intent for the State to completely occupy the field of the sale of cigarettes through vending machines rendering any local or municipal ordinances in this area constitutionally invalid.

Id. at 310, 631 A.2d 77. Thus, the pre-emptive scope of Maryland State law, as established in *Allied Vending*, is substantially less broad than Penn asserts.

Ordinance 307 does not fall within the pre-emptive scope of §§ 607-631. The purpose of Ordinance 307 is to effectuate § 404, the State law prohibition of the sale of cigarettes to minors. Though the reach of the field pre-empted—regulation of the sale of cigarettes through vending machines—overlaps the reach of § 404—the sale of cigarettes to minors—the two are distinct and separate fields. Penn does not claim that § 404 demonstrates the intent of the State to completely occupy the field of the regulation of cigarette sales to minors, nor, in this Court's view, would it have been successful had it chosen to do so. Therefore, this Court holds that Ordinance 307 has not been pre-empted by State law. Accordingly, this Court will grant the City's motion for summary judgment on this claim.

III. CONCLUSION

For the foregoing reasons, the City's motion for summary judgment will be granted as to all claims. The Court will enter a separate Order consistent with this Memorandum.

Herbert F. Murray
Senior United States District Judge

Dated: August 11, 1994

APPENDIX D

ANHEUSER-BUSCH, INCORPORATED

Plaintiff-Appellant

v.

Kurt L. SCHMOKE, in his official capacity as Mayor of Baltimore City; Mayor and City Council of Baltimore City; City Council of Baltimore City; David Tanner, in his official capacity as the General Superintendent of Zoning Administration and Enforcement, Defendants-Appellees, and John Joseph Curran, Attorney General of the State of Maryland, in his official capacity

Defendants.

The Association of National Advertisers, Incorporated; The American Association of Advertising Agencies; The Media Institute; National Association of Broadcasters; The Thomas Jefferson Center for the Protection of Free Expression; Washington Legal Foundation; Center for Science inthe Public Interest; Coalition for Beautiful Neighborhoods; Baltimore City Wide Liquor Coalition for Better Laws and Regulations, Amici Curiae.

PENN ADVERTISING OF BALTIMORE, INCORPORATED

Plaintiff-Appellant

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A Municipal Corporation

Defendant-Appellee

and

JOHN JOSEPH CURRAN, Attorney General of the State of Maryland, in his official capacity

Defendant

The Association of National Advertisers, Incorporated; The American Association of Advertising Agencies; The Media Institute; National Association of Broadcasters; The Thomas Jefferson Center for the Protection of Free Expression; Washington Legal Foundation; Center for Science in the Public Interest; Coalition for Beautiful Neighborhoods; Baltimore City Wide Liquor Coalition for Better Laws and Regulations, Amici Curiae.

Nos. 94-1431, 94-1432.

United States Court of Appeals,
Fourth Circuit

November 13, 1996

Before NIEMEYER and HAMILTON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge NIEMEYER wrote the majority opinion, in which Judge HAMILTON joined. Senior Judge BUTZNER wrote a dissenting opinion.

NIEMEYER, Circuit Judge:

On May 13, 1996, the Supreme Court handed down its decision in *44 Liquormart, Inc.* v. *Rhode Island*, --- U.S. ---, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), and a week later vacated our decision in this case and remanded it to us "for further consideration in light of *44 Liquormart, Inc.* v. *Rhode Island*." --- U.S. ----, 116 S.Ct. 1821, 134 L.Ed.2d 927. We have read the opinion in 44 Liquormart and have considered its impact on the judgment in this case. For the reasons that follow, we conclude that *44 Liquormart* does not require us to change our decision. Accordingly, we affirm the district court's judgment for the reasons previously given and readopt our previous decision.* See

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* In readopting our opinion, we do not continue to rely on *Posadas de Puerto Rico Associates* v. *Tourism Co. of P.R.*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), in view of the doubt placed on that opinion by a majority of the Court in 44

Anheuser-Busch, Inc. v. *Schmoke*, 63 F.3d 1305 (4th Cir.1995) Anheuser-Busch I).

I

In Anheuser-Busch I, we upheld against a constitutional challenge a city ordinance prohibiting the placement of stationary, outdoor advertising that advertises alcoholic beverages in certain areas of Baltimore City. 63 F.3d at 1317. The ordinance was designed to promote the welfare and temperance of minors exposed to advertisements for alcoholic beverages by banning such advertisements in particular areas where children are expected to walk to school or play in their neighborhood. *Id.* at 1314-17. Applying the four- prong test for evaluating commercial speech announced in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), we concluded, in respect to the disputed prongs, that the ban of outdoor advertising of alcoholic beverages in limited areas directly and materially advances Baltimore's interest in promoting the welfare and temperance of minors. See *Anheuser-Busch I*, 63 F.3d at 1314. After our own independent assessment, we recognized the reasonableness of Baltimore City's legislative finding that there is a "definite correlation between alcoholic beverage advertising and underage drinking." *Id.* We also concluded that the regulation of commercial speech is not more extensive than necessary to serve the governmental interest. *Id.* at 1316-17. Recognizing that in the regulation of commercial speech there is some latitude in the "fit" between the regulation and the objective, we concluded that "no less restrictive means may be available to advance the government's

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Liquormart. See — U.S. at —, 116 S.Ct. at 1511 (Stevens, J., concurring in the judgment) (joined by Kennedy, Thomas, and Ginsburg, JJ.) and — U.S. at —, 116 S.Ct. at 1522 (O'Connor, J., concurring in the judgment) (joined by Rehnquist, C.J., and Souter and Breyer, JJ.). Because we do not defer blindly to the legislative rationale, but rather agree with it based on our own independent conclusion about the fit between legislative objective and the regulation used to achieve that objective, the holding in Posadas is not necessary to our opinions upholding Baltimore City's ordinance.

interest." *Id.* at 1316. While we acknowledged that the geographical limitation on outdoor advertising may also reduce the opportunities for adults to receive the information, we recognize that there were numerous other means of advertising to adults that did not subject the children to "involuntary and unavoidable solicitation [while] ... walking to school or playing in their neighborhood." *Id.* at 1314. Based on our close look at Baltimore's asserted goal and the billboard zoning used to achieve that objective, we concluded:

> Although no ordinance of this kind could be so perfectly tailored as to all and only those areas to which children are daily exposed, Baltimore's efforts to tailor the ordinance by exempting commercial and industrial zones from its effort renders it not more extensive than is necessary to serve the governmental interest under consideration. *Id.* at 1317.

II

In *44 Liquormart*, by contrast, the State prohibited all advertising throughout Rhode Island, "in any manner whatsoever," of the price of alcoholic beverages except for price tags or signs displayed with the beverages and not visible from the street. --- U.S. at ---, 116 S.Ct. at 1501. The State contended that the ban served the State's interest in promoting temperance by keeping alcoholic prices high and therefore consumption low. See *Id.* The district court found as a fact, however, that the ban "has no significant impact" on consumption. *44 Liquor Mart, Inc.* v. *Racine*, 829 F.Supp. 543, 549 (D.R.I.1993). The State also argued that the Twenty-first Amendment's delegation to the states of the power "to prohibit commerce in, or the use of, alcoholic beverages," U.S. Const. amend. XXI, § 2, favors the state's ban of price advertising of alcoholic beverages. See --- U.S. at ---, 116 S.Ct. at 1502.

The Supreme Court held the blanket ban unconstitutional simply as "an abridgement of speech protected by the First Amendment" and rejected the claim that the Twenty-first Amendment "save[d] Rhode Island's ban on liquor price advertising." — U.S. at ---, --- - ---, 116 S.Ct. at 1501, 1514-15. The opinion for the Court did not provide a rationale for its conclusion that the ban violated the First Amendment, and no

opinion addressing the First Amendment violation commanded a majority of the Court. Under *Marks* v. *United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193, 97 S.Ct. at 993.

Applying the Marks rule, eight justices in three separate opinions concluded that the mechanism of keeping alcoholic prices high as a way to keep consumption low imposes too broad a prohibition on speech to be justified by the end. See 44 Liquormart, --- U.S. at ---- - ----, 116 S.Ct. at 1509-10 (Stevens, J., concurring in the judgment); id. at ----, 116 S.Ct. at 1519 (Thomas, J., concurring in the judgment); *Id.* at ---- - ----, 116 S.Ct. at 1521-22 (O'Connor, J., concurring in the judgment). Justice Stevens, joined by Justices Kennedy, Souter, and Ginsburg, noted that "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance." *Id.* at ----, 116 S.Ct. at 1509. Justice Stevens also noted that alternative forms of regulation were available that would not impinge speech and would "be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation." *Id.* at ----, 116 S.Ct. at 1510. Similarly, Justice O'Connor, writing an opinion in which Chief Justice Rehnquist, Justice Souter and Justice Breyer joined, concluded,

> If the target is simply higher prices generally to discourage consumption, the regulation imposes too great, and unnecessary, a prohibition on speech in order to achieve it.... "[T]he objective of lowering consumption of alcohol by banning price advertising could be accomplished by establishing minimum prices and/or by increasing sales taxes on alcoholic beverages."

Id. at ---- - ----, 116 S.Ct. at 1521-22 (O'Connor, J., concurring in the judgment) (quoting 44 Liquormart, Inc. v. Rhode Island, 39 F.3d 5, 7 (1st Cir.1994) (quoting Rhode Island's expert witness)). Justice O'Connor concluded that because the regulation fails "even

the less stringent standard set out in Central Hudson, nothing here requires adoption of a new analysis for the evaluation of commercial speech regulation." *Id.* at ---, 116 S.Ct. at 1522 (O'Connor, J., concurring in the judgment). Eight justices thus concluded that keeping legal users of alcoholic beverages ignorant of prices through a blanket ban on price advertising does not further any legitimate end. See *Id.* at --- - ---, 116 S.Ct. at 1509-10 (Stevens, J., concurring in the judgment); *Id.* at ---, 116 S.Ct. at 1518 (Thomas, J., concurring in the judgment); *Id.* at --- - ---, 116 S.Ct. at 1521-22 (O'Connor, J., concurring in the judgment).

III

While Rhode Island's blanket ban on price advertising failed Central Hudson scrutiny, Baltimore's attempt to zone outdoor alcoholic beverage advertising into appropriate areas survived our "close look" at the legislature's means of accomplishing its objective in *Anheuser-Busch I*. Baltimore's ordinance expressly targets persons who cannot be legal users of alcoholic beverages, not legal users as in Rhode Island. More significantly, Baltimore does not ban outdoor advertising of alcoholic beverages outright but merely restricts the time, place, and manner of such advertisements. And Baltimore's ordinance does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors.

Moreover, in Baltimore City's case, neither the state nor the city is attempting to undermine democratic processes and circumvent public scrutiny by substituting a ban on advertising for a ban on the product, as the 44 Liquormart Court feared was the case with Rhode Island. --- U.S. at ---, 116 S.Ct. at 1508 (Stevens, J., concurring in the judgment); see also *Id.* at ---, 116 S.Ct. at 1517 (Thomas, J., concurring in the judgment) (citing "the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly"); Central Hudson, 447 U.S. at 566 n. 9, 100 S.Ct. at 2351 n. 9; *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 780 n. 8, 96 S.Ct. 1817, 1835 n. 8, 48 L.Ed.2d 346 (1976) (Stewart, J., concurring). Rather, in Baltimore City, like in other communities, the possession and consumption of alcoholic

beverages by minors has been already banned directly and forthrightly through legislation. See Md.Code Art. 27, ss 400-403A. Baltimore's restrictions thus reinforce the democratic decisionmaking mechanism's conclusion as to the dangerousness of underage drinking by protecting children from exposure to advertising which the legislature reasonably considers harmful in itself to children's maturation. And far from undermining the free dissemination of information to independently choosing consumers, Baltimore's ordinance supports the full development of its young so that they will be able to assess their market options intelligently and independently.

In addition to the reasons given in *Anheuser-Busch I* and given here based on our consideration of *44 Liquormart*, the differences between the Baltimore and Rhode Island regulations further support the constitutionality of Baltimore's ordinance. In contrast to Rhode Island's desire to enforce adult temperance through an artificial budgetary constraint, Baltimore's interest is to protect children who are not yet independently able to assess the value of the message presented. This decision thus conforms to the Supreme Court's repeated recognition that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media. In the context of cable television, the Supreme Court recently upheld restrictions on programming imposed by the Cable Television Consumer Protection and Competition Act as a means of protecting children from indecent programming. See *Denver Area Educ. Telecommunications Consortium, Inc.* v. *FCC*, — U.S. —, —, 116 S.Ct. 2374, 2386, 135 L.Ed.2d 888 (1996) (plurality opinion). In the context of the radio medium, the Court has approved extra restrictions on indecent speech because of the pervasiveness of the medium and the presence of children in the audience. See *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 750-51, 98 S.Ct. 3026, 3040-41, 57 L.Ed.2d 1073 (1978) (comparing indecent speech during hours when children are listening to the proverbial pig in the parlor); see also *Action for Children's Television* v. *FCC*, 58 F.3d 654, 657 (D.C. Cir. 1995) (upholding the Public Telecommunications Act against a First Amendment challenge based on the state's compelling interest in protecting minors), cert. denied, — U.S. —, 116 S.Ct. 701, 133 L.Ed.2d

658 (1996). Similarly, the Supreme Court has sustained a law which protected children from non-obscene literature. See *Ginsberg* v. *New York*, 390 U.S. 629, 639-40, 88 S.Ct. 1274, 1280-81, 20 L.Ed.2d 195 (1968). And, while it has acknowledged a right to private possession of adult pornography in the home, see *Stanley* v. *Georgia*, 394 U.S. 557, 566, 89 S.Ct. 1243, 1248-49, 22 L.Ed.2d 542 (1969), the Court has clearly distinguished child pornography and allowed a stronger legislative response "to destroy a market for the exploitative use of children." *Osborne* v. *Ohio*, 495 U.S. 103, 109, 110 S.Ct. 1691, 1696, 109 L.Ed.2d 98 (1990); see also *New York* v. *Ferber*, 458 U.S. 747, 759, 102 S.Ct. 3348, 3355-56, 73 L.Ed.2d 1113 (1982). The underlying reason for the special solicitude of children was articulated long ago: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince* v. *Massachusetts*, 321 U.S. 158, 168, 64 S.Ct. 438, 443, 88 L.Ed. 645 (1944).

Baltimore's ordinance attempts to protect its children in a manner and with a motive distinct from those evidenced by Rhode Island in *44 Liquormart* and in accord with an unbroken chain of Supreme Court cases which indicate its desire to ensure that children do not become lost in the marketplace of ideas. Accordingly, on reconsideration of our Central Hudson analysis of the time, place, and manner restriction in *Anheuser-Busch I* in light of *44 Liquormart*, we again affirm the judgment of the district court.

IT IS SO ORDERED.

BUTZNER, Senior Circuit Judge, dissenting:

I dissent because I believe we should vacate the district courts' judgments and remand these cases for evidentiary hearings. I address in this dissent both the cases pertaining to advertising of alcoholic beverages and the case pertaining to the advertising of cigarettes.

The district court, whose judgment we review, noted that the parties agree that "the [Anheuser-Busch] advertising at issue is not unlawful or misleading, and that the City's interest in promoting the welfare and temperance of minors is substantial...." *Anheuser-Busch, Inc.* v. *Mayor and City Council*, 855 F. Supp.

811, 813 (D. Md. 1994). This agreement established that the advertising satisfies the first two parts of the test the Supreme Court prescribed for determining whether regulation of commercial speech violates the First Amendment. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). The difficulty in these cases, and in the related case pertaining to cigarette advertising,* arises from the third and fourth parts of the *Central Hudson* inquiry. These are "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351. In the cigarette advertising case, the district court noted that the parties agree with the first — but not the second–part of the *Central Hudson* test. *Penn Advertising*, 862 F. Supp. at 1406. This slight difference in the posture of the cases does not change my analysis of the proper response to the Supreme Court's remand.

My dissent concerns how we should respond to the Supreme Court's remand and what procedures we should follow at this stage of the litigation. My dissent does not undertake to express an opinion on the merits of these cases. I wholeheartedly agree with Baltimore's officials, the amici who support them, and the parties that minors should not be encouraged directly or subliminally to drink or smoke. Nevertheless, balancing the First Amendment's protection of commercial speech against the city's restriction of the advertising at issue requires answering the third and fourth inquiries of *Central Hudson*. To obtain a sound basis for deciding these inquiries, district and reviewing courts need factual records. The district courts reached their decisions in *Anheuser-Busch* and *Penn Advertising* without an evidentiary hearing. Instead, the courts relied in large part on *Posadas de Puerto Rico Assoc.* v. *Tourism Co. of P.R.*, 478 U.S. 328, 106 S. Ct. 2968, 92 L.Ed.2d 266

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* *Penn Advertising of Baltimore, Inc.* v. *Mayor and City Council*, 862 F. Supp. 1402 (D. Md. 1994), *aff'd*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded sub nom. Penn Advertising of Baltimore, Inc.* v. *Schmoke*, — U.S. —, 116 S. Ct. 2575, 135 L.Ed.2d 1090 (1996).

(1986), and deferred to the Baltimore City Council's legislative record and findings. Unfortunately, the district courts did not have the benefit of *44 Liquormart, Inc.* v. *Rhode Island*, — U.S. —, 116 S. Ct. 1495, 134 L.Ed.2d 711 (1996).

In *44 Liquor Mart*, the district court did not accept Rhode Island's legislative determination that banning the advertising of liquor prices would reduce consumption. Instead, the district court conducted an evidentiary hearing and reached the conclusion, which was based on testimony at the hearing, that the ban was unconstitutional. *44 Liquor Mart, Inc.* v. *Racine*, 829 F. Supp. 543 (D.R.I. 1993). The court of appeals reversed, accepting as reasonable Rhode Island's submission that competitive price advertising would increase consumption. It held that the statute was constitutional. *44 Liquormart, Inc.* v. *Rhode Island*, 39 F.3d 5 (1st Cir. 1994). In turn, the Supreme Court reversed, criticizing the court of appeals' reliance on legislative findings to determine whether the ban of commercial speech infringed the First Amendment. *44 Liquormart*, — U.S. at —— - ——, 116 S. Ct. at 1503-04 (Stevens, J.) and — U.S. at ——, 116 S. Ct. at 1515 (O'Connor, J., concurring in the judgment). By deciding not to remand for an evidentiary hearing despite the teaching of *44 Liquormart*, I am concerned that our court is following the First Circuit's path.

In *44 Liquormart*, the Court criticized its own opinion in *Posadas*, 478 U.S. at 342, 344, 106 S. Ct. at 2977, 2978, because it had "accepted as reasonable, without further inquiry, Puerto Rico's assertions that the regulations furthered the government's interest and were no more extensive than necessary to serve that interest." *44 Liquormart*, — U.S. at ——, 116 S. Ct. at 1522 (O'Connor, J., concurring in the judgment). At least seven members of the Court expressly decided not to follow *Posadas*, concluding that a legislature's decision to suppress commercial speech, even if reasonable, is not entitled to deference. *44 Liquormart*, — U.S. at —— - ——, 116 S. Ct. at 1510-11 (Stevens, J., concurring in the judgment) and — U.S. at ——, 116 S. Ct. at 1522 (O'Connor, J., concurring in the judgment). Rather than accept at face value the legislature's proffered justification for a speech regulation, courts should take a "closer look" and carefully examine "the relationship between the asserted goal and the speech

restriction used to reach that goal." — U.S. at —, 116 S. Ct. at 1522 (O'Connor, J., concurring in the judgment). In other words, courts should examine the evidence presented by the parties to make an independent determination about whether the underlying facts satisfy the *Central Hudson* test. See — U.S. at — - —, 116 S.Ct. at 1509-10 (Stevens, J., concurring in the judgment).

The independent evaluation that is now required is not possible in the absence of a factual record. It is true that the positions taken by Baltimore may turn out to be supported by a preponderance of the evidence. But speculation about what might be is not enough to resolve issues of First Amendment coverage that must ultimately turn on factual findings. In order to meet its burden under *Central Hudson*, the city must show "not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.' " *44 Liquormart*, — U.S. at —, 116 S. Ct. at 1509 (Stevens, J., concurring in the judgment) (quoting *Edenfield* v. *Fane*, 507 U.S. 761, 771, 113 S.Ct. 1792, 1800-01, 123 L.Ed.2d 543 (1993)). Even assuming, as common sense might suggest, that Baltimore's restrictions will reduce underage drinking to some degree, without any findings of fact we cannot determine whether the effect will be significant. See *44 Liquormart*, — U.S. at —, 116 S.Ct. at 1509 (Stevens, J., concurring in the judgment). Accordingly, each party should be given the opportunity to present evidence on this issue and to test the strength of the opposing party's evidence.

Baltimore must also show that its speech regulation is narrowly tailored. *Anheuser-Busch* argued that the city could implement other measures that would reduce underage drinking as effectively as the advertising restrictions without regulating speech. The company specifically suggested education programs and increased law enforcement efforts. *Cf. 44 Liquormart*, — U.S. at —, 116 S. Ct. at 1510 (Stevens, J., concurring in the judgment) and — U.S. at — - —, 116 S.Ct. at 1521-22 (O'Connor, J., concurring in the judgment). The company's position must be viewed in light of the numerous exceptions to the ordinance that inevitably will allow a substantial amount of alcohol advertising to reach a great number of minors. The company's argument should be evaluated on the strength of the facts that support and negate it. The parties should be given the opportunity to present and contest those facts.

The same reasoning applies to Baltimore's restriction on cigarette advertising. Whether that restriction advances the asserted governmental interest and whether it is unnecessarily extensive raise factual questions that only an evidentiary hearing can answer. For example, Baltimore's transit buses, which carry children as well as adults, are exempted from the ordinance that restricts advertising of cigarettes. The ordinance permits such advertising at a ball park where minors watch games. What effect these and similar facts have on the validity of the city ordinance should be weighed by a court.

A charge that advertising restrictions infringe rights guaranteed by the First Amendment requires careful evaluation assessing the credibility of witnesses and weighing the evidence. These functions should be performed by a judge — not by a city council. See *44 Liquormart*, --- U.S. at ---, 116 S. Ct. at 1511 (Stevens, J., concurring in the judgment). The court should base its evaluation of the case on the facts underlying the dispute and the reasonable inferences drawn from those facts rather than the version of the facts that appears in the allegations and legislative findings. By affirming the district court's judgment without adducing and examining the facts, a reviewing court engages in the type of deferential review that *44 Liquormart* deems improper.

Present in this litigation are questions about the credibility of expert witnesses and genuine issues of material fact concerning the inferences that reasonably can be drawn from the evidence. Because of these circumstances, neither summary judgment nor dismissal under Rule of Civil Procedure 12(b)(6) is appropriate.

I would vacate the district court's judgment and remand these cases for evidentiary hearings.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANHEUSER-BUSCH, INCORPORATED,

Plaintiff-Appellant,

v.

KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; MAYOR AND CITY COUNCIL OF BALTIMORE CITY; CITY COUNCIL OF BALTIMORE CITY; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,

Defendants-Appellees,

and

JOHN JOSEPH CURRAN, Attorney General of the State of Maryland, in his official capacity,

Defendant.

THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE MEDIA INSTITUTE; NATIONAL ASSOCIATION OF BROADCASTERS; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; WASHINGTON LEGAL FOUNDATION; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS,

Amici Curiae.

PENN ADVERTISING OF BALTIMORE, INCORPORATED,

Plaintiff-Appellant,

v.

JOHN JOSEPH CURRAN, Attorney General of the State of Maryland, in his official capacity,

Defendant.

THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE MEDIA INSTITUTE; NATIONAL ASSOCIATION OF BROADCASTERS; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; WASHINGTON LEGAL FOUNDATION; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS,

Amici Curiae.

Nos. 94-1431, 94-1432.

Argued March 6, 1995.
Decided Aug. 31, 1995.

Before NIEMEYER and HAMILTON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge HAMILTON and Senior Judge BUTZNER joined.

OPINION

NIEMEYER, Circuit Judge:

We decide in this case whether Ordinance 288 enacted by the Mayor and City Council of Baltimore, Maryland, prohibiting the placement of stationary, outdoor "advertising that advertises alcoholic beverages" in certain areas of the City, violates the First and Fourteenth Amendment protections of commercial speech. The

district court concluded, after applying the four-part test for evaluating commercial speech announced in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), that the ordinance did not violate the Constitution,[1] and we now affirm.

I

Under Maryland law, it is illegal to sell any alcoholic beverage to, or to obtain any alcoholic beverage for, a person under 21 years of age. It is also illegal for a person under 21 years of age to obtain, possess, or control an alcoholic beverage. Md.Code, Art. 27, §§ 400-403A. To advance the state's interest in those prohibitions and to promote "the welfare and temperance of minors exposed to advertisements for alcoholic beverages," the Maryland legislature authorized the Mayor and City Council of Baltimore (collectively "Baltimore") to adopt an ordinance restricting the placement of signs that advertise alcoholic beverages in "publicly visible locations," *i.e.* on "outdoor billboards, sides of buildings, and freestanding signboards." Md.Code, Art. 2B, § 222. The authorization, however, contains 10 limitations which prohibit Baltimore from restricting such advertising on, for example, buses, taxicabs, commercial vehicles used in the transportation of alcoholic beverages, and signs at businesses licensed to sell alcoholic beverages, including professional sports stadiums.

In January 1994, Baltimore exercised the authority granted it by the State and enacted Ordinance 288 prohibiting the outdoor advertising of alcoholic beverages in certain locations in Baltimore City.[2] The prohibition in the ordinance is subject to the same 10

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[1] The district court also concluded that the protection afforded by Article 40 of the Maryland Declaration of Rights is no broader than that afforded by the First Amendment and that therefore the ordinance also did not violate the Maryland Constitution. That ruling is not appealed.

[2] The core provision of the ordinance provides:

exceptions specified in the State's authorizing statute, and it also includes an exception permitting such advertising in certain commercially and industrially zoned areas of the City. By its terms, the ordinance was to become effective February 5, 1994.

Before enacting the ordinance, the Baltimore City Council conducted public hearings, receiving testimony and previously conducted studies detailing the adverse effects on minors of alcohol consumption and the correlation between underage drinking and the advertising of alcoholic beverages.[3] While one of the studies, the report of the Governor's Prevention Committee, acknowledged that certain studies advanced by the alcohol beverage and advertising industries showed no correlation between alcohol advertising and underage drinking, it concluded that the overwhelming majority of research studies showed a definite correlation. To combat underage drinking, the Prevention Committee's report recommended, among other things, that communities regulate alcoholic beverage advertising on billboards.

> Alcoholic beverage advertisements. No person may place any sign, poster, placard, device, graphic display, or any other form of advertising that advertises alcoholic beverages in publicly visible locations. In this section "publicly visible locations" includes outdoor billboards, sides of buildings, and free standing signboards.

Baltimore City Code, Art. 30 (zoning), § 10.0-1(H).

[3] The preamble to the ordinance refers to at least four studies considered by the City Council: (1) a report by the Prevention Committee of the Governor's Drug and Alcohol Abuse Commission, entitled "The Impact of Alcohol Advertising and the Use of Alcohol in Television Programs and Films on Underage Drinking"; (2) the "1992 Maryland Adolescent Drug Survey" conducted by the Maryland State Department of Education; (3) a report of the U.S. Inspector General, Department of Health and Human Services, entitled "Youth and Alcohol: Dangerous and Deadly Consequences"; and (4) a report of the U.S. Inspector General, Department of Health and Human Services, entitled "Youth and Alcohol: Drinking and Crime."

In the preamble to the ordinance, the City Council summarized its findings in support of the ordinance. The City Council found, for instance, that the consumption of alcoholic beverages is involved in at least one-half of all the major causes of death among youth and that about one-third of all juvenile males arrested said they had consumed alcohol within the previous 72 hours. In concluding that a connection exists between underage drinking and the widespread advertising of alcoholic beverages, the City Council found that alcoholic beverages are the second most heavily advertised products in America (after cigarettes), and that outdoor billboards are a "unique and distinguishable" medium of advertising which subjects the public to involuntary and unavoidable forms of solicitation. The City Council noted that children are exposed to the advertising of alcoholic beverages "simply by walking to school or playing in their neighborhood" and that children's "attitudes favorable to alcohol are significantly related to their exposure to alcohol advertisements." The City Council pointed to the Prevention Committee's report that the "'overwhelming majority' of research studies showed a definite correlation between alcohol advertising and underage drinking" and concluded that "[a]n ordinance restricting the placement of advertisements for alcoholic beverages in publicly visible locations within Baltimore City is necessary for the promotion of the welfare and temperance of minors exposed to such advertisements." Attempting to tailor its ban, the City Council allowed advertising of alcoholic beverages in commercial and industrial areas, stating that it was "narrowly focus[ing] its efforts on those advertisements which most directly affect minors where they live, attend school, attend church and engage in recreational activities."

On January 14, 1994, several weeks before the ordinance was to become effective, Anheuser-Busch, Inc., filed suit in federal court, facially challenging the constitutionality of the ordinance under the First and Fourteenth Amendments. It also challenged the ordinance as it might be applied to public service messages which Anheuser-Busch typically sponsors. One week later, Penn Advertising of Baltimore, Inc., filed a similar suit.

Anheuser-Busch is the nation's largest brewer of beers and malt beverages, producing approximately 15 different brands,

including Budweiser, Michelob, and Busch. It advertises in all media, including outdoor billboards and displays. In addition to contending that there is no correlation between alcoholic beverage advertising and underage drinking, Anheuser-Busch asserts that the purpose of its advertising is "to solidify brand loyalty and increase market share by shifting adult beer drinkers from other brands to the advertised brand of beer." In its complaint, Anheuser-Busch alleges that it promotes its brands of beer on dozens of billboards in Baltimore and that on seven it publishes public service messages such as, "Know when to say when" and "Let's stop underage drinking before it starts." These public service messages typically include a corporate or product logo of Anheuser-Busch.

Penn Advertising is engaged in the business of placing advertising on outdoor advertising signs located throughout Baltimore. It leases land from private property owners, erects and maintains outdoor sign structures on those locations, and rents these signs to its customers, including Anheuser-Busch.

Shortly after commencing these actions, Anheuser-Busch and Penn Advertising filed a motion for a preliminary injunction to enjoin enforcement of Ordinance 288 pending the litigation, and the district court issued a stay of the ordinance's enforcement. The Mayor and City Council of Baltimore filed motions to dismiss the actions under Federal Rule of Civil Procedure 12(b)(6) on the grounds that the ordinance is (1) protected by the Twenty-First Amendment and (2) a proper regulation of commercial speech under the framework established in *Central Hudson*. Baltimore attached to its motions the legislative history of Ordinance 288, including the transcript of the hearings before the City Council and copies of four studies that were considered by the Council.

Following a hearing, the district court issued an opinion upholding the constitutionality of the ordinance. *Anheuser-Busch, Inc.* v. *Mayor and City Council*, 855 F.Supp. 811 (D.Md.1994). The court also continued its stay of the ordinance's enforcement pending appeal. Contrary to the parties' entreaties that the district court treat Baltimore's motion only as a 12(b)(6) motion, the court concluded in its opinion that because it considered matters outside of the pleadings, it would treat Baltimore's motion to dismiss as a

motion for summary judgment under Rule 56. On the merits, the court found that "a reasonable fit exists between the Ordinance and the City's asserted interests," *id.* at 820, and that billboards "loom[ ] over children every day while they walk to school, and every time they play in their neighborhood, thus forming an inescapable part of their daily life . . . . Billboard advertisements thus form a constant impetus to consume the product being advertised, the precise goal of the advertisement." *Id.* at 822. The court held the ordinance constitutional after concluding that it "directly advances the City's asserted interest in promoting the welfare and temperance of minors" and is "narrowly tailored" to that end. *Id.* at 818. Having found the ordinance constitutional under the framework set outk in *Central Hudson*, the court did not address Baltimore's argument that the ordinance was protected by the Twenty-First Amendment.

On appeal, Anheuser-Busch and Penn Advertising contend that the district court erred by converting Baltimore's motions to dismiss into motions for summary judgment without allowing them a reasonable opportunity to submit all materials pertinent to consideration of a motion for summary judgment. On the merits, they argue that the ordinance is unconstitutional on its face because (1) it does not directly and materially advance the government's interest in promoting temperance of minors and (2) it is not narrowly tailored to serve that purpose.[4] They also argue that, as applied, the ordinance would impermissibly restrict their noncommercial speech.

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[4] Amici curiae briefs, addressing principally the facial challenge under the First Amendment, were received from the Association of National Advertisers, Inc., the American Association of Advertising Agencies, The Media Institute, the National Association of Broadcasters, the Thomas Jefferson Center for the Protection of Free Expression, the Coalition for Beautiful Neighborhoods, the Baltimore City Wide Liquor Coalition for Better Laws and Regulations, and the Center for Science in the Public Interest.

II

We address first the contention that the district court erred in converting Baltimore's motions to dismiss into motions for summary judgment without first providing the parties an opportunity to conduct discovery and to submit all pertinent materials to the court. Anheuser-Busch and Penn Advertising contend that they had no indication that the district court had converted the motions to dismiss into motions for summary judgment until the court issued its memorandum opinion.

Federal Rule of Civil Procedure 12(b) provides in relevant part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, *and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

(Emphasis added). We have held that a court choosing to treat a motion to dismiss as one for summary judgment errs if it fails to provide the parties with notice and a reasonable opportunity to present their positions under Rule 56. *See Gay* v. *Wall*, 761 F.2d 175, 178 (4th Cir. 1985); *Plante* v. *Shivar*, 540 F.2d 1233, 1235 (4th Cir. 1976); *Johnson* v. *RAC Corp.*, 491 F.2d 510, 513 (4th Cir. 1974).

In ruling on Baltimore's 12(b)(6) motions, the district court stated, without prior notice to the parties, "Because the Court has considered matters outside of the pleadings, the Court will treat the Motion to Dismiss as a Motion for Summary Judgment under Rule 56." 855 F.Supp. at 812. Apparently the court's facial analysis of the ordinance relied to some extent on the exhibits which Baltimore filed with its motion to dismiss, and the court's as-applied analysis involved consideration of the submissions Anheuser-Busch offered in support of its motion for a preliminary injunction. The exhibits

which Baltimore filed in support of its motion to dismiss consisted of a copy of Ordinance 288, a transcript of the hearings before the City Council, and four studies that the City Council considered as support for the ordinance. In support of their motions for a preliminary injunction, Anheuser-Busch and Penn Advertising submitted, among other things, the Brewing Industry Advertising Code, sample billboard advertisements, and studies which refute a correlation between alcoholic beverage advertising and underage drinking.

The principal challenge to Ordinance 288, advanced under the last two prongs of *Central Hudson*, consists of the contention that the ordinance (1) does not directly advance the stated governmental purpose and (2) is not narrowly tailored to accomplish that purpose. These prongs focus on the fit between Baltimore's statutory objective and the means it selected to achieve that objective. On this facial challenge, the City bears the burden not of establishing that at every coordinate the regulation advances a governmental purpose and does no more, but rather that it had an objectively reasonable belief that the means which it selected constituted a reasonable "fit" with the regulation's purpose.

If *Central Hudson's* test required a perfect fit, then Anheuser-Busch would only have to demonstrate some application of the statute inconsistent with the statute's purpose to render it unconstitutional for all purposes. Moreover, if the test required a perfect fit, Anheuser-Busch would certainly be entitled to complete discovery in order to identify all of the statute's possible applications. However, in response to a facial challenge to a regulation of commercial speech, the burden falls on the government to justify its legislative action, but it does not demand that the government canvass every conceivable situation in which some member of the public may be affected atypically by the statute. And the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met. *See, e.g.*,

Florida Bar v. *Went For It, Inc.*, — U.S. —, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995). As the Supreme Court recently observed in *Florida Bar*:

> [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense."

Id. at — - —, 115 S.Ct. at 2377-79 (citations omitted). Cf. *Edenfield* v. *Fane*, — U.S. —, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (pointing to facts relevant to consideration of *as-applied* challenge to commercial speech regulation). In *Florida Bar*, the Court relied principally on a study conducted by the Florida bar on the effects of lawyer advertising to conclude that the prohibition against lawyer solicitation within 30 days of an accident directly and materially advanced the state's substantial interest of preserving the integrity of the legal profession. Thus, the government's burden of justifying its legislative enactment against a facial challenge may be carried by pointing to the enactment itself and its legislative history. These are "legislative facts," the substance of which cannot be trumped by the fact finding apparatus of a single court. *See Dunagin* v. *City of Oxford*, Miss., 718 F.2d 738, 748-49 n. 8 (5th Cir.1983) (en banc), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984). While a party challenging an ordinance can point to other factors not considered by the legislature to demonstrate that the legislature acted irrationally, it cannot subject legislative findings themselves to judicial review under a clearly erroneous standard or otherwise. To do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other. The court's role in reviewing the constitutionality of a legislative enactment is more fundamental; it is limited to addressing whether the legislative enactment conflicts with the Constitution. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

By force of the same reasoning, if a plaintiff challenges a legislative enactment *as applied* to an actual circumstance, then the

court is given the task of finding the facts defining that circumstance and determining how the circumstance is impacted by the legislative enactment. *See Edenfield*, --- U.S. at ---- - ----, 113 S.Ct. at 1800-01.

In this case, the district court properly looked to the legislative history of Ordinance 288 to determine that Baltimore had met its burden under *Central Hudson*. Having found the burden met, the court was not required on a facial challenge to look further with a more specific inquiry into the ordinance's impact on Anheuser-Busch and Penn Advertising, nor did it. It was unnecessary for the court to have concluded that, because it looked beyond the pleadings to the transcript and four studies constituting the legislative history, it had to consider the case under Rule 56. For purposes of Rule 12(b)(6), the legislative history of an ordinance is not a matter beyond the pleadings but is an adjunct to the ordinance which may be considered by the court as a matter of law. *See generally* 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1357 (1990) (in deciding Rule 12(b)(6) motions, courts may consider matters of public record, items appearing in the record of the case, as well as exhibits attached to the complaint).

Thus, on the facial challenge to Ordinance 288, we will review the district court's decision, insofar as it considered only the ordinance and its legislative history, as a ruling under Federal Rule of Civil Procedure 12(b)(6), and we review that ruling *de novo*.

III

Traditionally, commercial speech was thought to be an aspect of a free market economy, providing information necessary to enable informed market decisions to be made. While commercial speech was subject to governmental regulation, such regulation was resisted by the same forces that favor open and competitive markets. Such speech was not, however, thought to be protected by the First Amendment. *See, e.g.*, *Valentine* v. *Chrestensen*, 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942). Beginning in 1975 with the Supreme Court's decision in *Bigelow* v. *Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), and in 1976

with its decision in *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), a "measure" of First Amendment protection was afforded commercial speech in respect of its informational function. But that protection is significantly weaker than that accorded to the regulation of which is examined under the rubric of strict scrutiny. *See Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 505-07, 101 S.Ct. 2882, 2891-92, 69 L.Ed.2d 800 (1981) (plurality opinion). The Supreme Court has characterized the review of commercial speech regulation as one of intermediate scrutiny, *see generally Florida Bar*, — U.S. at ---- - ----, 115 S.Ct. at 2375, which is consistent with the "subordinate position [of commercial speech] in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978).

Intermediate scrutiny of commercial speech regulation is conducted under the four-pronged scheme set forth in *Central Hudson*. Because the basis for affording protection to commercial speech pertains to its informational function, in order to be entitled to any First Amendment protection, the speech must (1) concern lawful activity and not be misleading. *Central Hudson*, 447 U.S. at 563, 100 S.Ct. at 2350. If the commercial speech meets that threshold prong, it may nevertheless be regulated if the government (2) asserts a substantial interest in support of its regulation; (3) demonstrates that the regulation "directly advances the governmental interest asserted"; and (4) demonstrates that the regulation is "narrowly drawn," *i.e.* "not more extensive than is necessary" to serve the governmental interest. *Id.* at 565-66, 100 S.Ct. at 2351. *See also Florida Bar*, — U.S. at ----, 115 S.Ct. at 2375-77.

The first two prongs of *Central Hudson* are not disputed in this case. First, the purchase and consumption of alcoholic beverages are generally lawful, and no party claims that Baltimore's ordinance targets misleading advertising. And second, it is conceded that Baltimore City has a substantial interest in promoting "the welfare and temperance of [its] minors," the interest which it seeks to advance through Ordinance 288. The dispute in this case centers on the third and fourth prongs of *Central Hudson*—whether

Ordinance 288 "directly advances" Baltimore City's interest in reducing underage drinking and whether the ordinance is not more extensive than necessary to serve that interest, *i.e.* whether it is "narrowly drawn." The inquiry required under these two prongs amounts to consideration of the "fit" between the City's ends and the means chosen to accomplish them. *See Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 341, 106 S.Ct. 2968, 2976-77, 92 L.Ed.2d 266 (1986); *United States* v. *Edge Broadcasting Co.*, --- U.S. ----, ----, 113 S.Ct. 2696, 2705, 125 L.Ed.2d 345 (1993).

The inquiry under *Central Hudson's* third prong—whether the regulation directly advances the stated interest—does not involve as strict a nexus as that inherent in the traditional tort concept of causation. Rather, the inquiry seeks to elicit whether it was reasonable for the legislative body to conclude that its goal would be advanced in some material respect by the regulation. In *Edge*, where the federal regulation under consideration prohibited the broadcasting of lottery advertisements from facilities in North Carolina (in support of that state's anti-gambling policy), the Edge Broadcasting Company contended that the regulation did not advance the governmental interest at stake by sufficiently direct means. The company demonstrated that even though its broadcasting facility was located on the North Carolina side of the Virginia/North Carolina border, over 90% of its listeners were located in Virginia, where gambling was not illegal. It also noted that the federal regulation did not prohibit a Virginia-based broadcasting company from directing its signal to North Carolina listeners and advertising the Virginia lottery. The company argued, therefore, that the regulation did not directly advance the stated governmental interest of supporting North Carolina's anti-gambling policy. Rejecting the company's argument, the Supreme Court applied a standard that validated the legislature's commonsense judgment that its interests would be advanced by the regulation:

> Congress plainly made the commonsense judgment that each North Carolina station would have an audience in that State, even if its signal reached elsewhere and that enforcing the statutory restriction would insulate each station's listeners from

lottery ads and hence advance the governmental purpose of supporting North Carolina's laws against gambling.

— U.S. at —, 113 S.Ct. at 2704. As the result of applying this standard the Court concluded, "We have no doubt that the statutes directly advanced the governmental interest at stake in this case. . . . [T]his would plainly be the case even if, as applied to Edge, there were only marginal advancement of that interest." *Id.* — U.S. at —, 113 S.Ct. at 2704.

Similarly, in *Posadas* the Court observed that it was reasonable for the Puerto Rico legislature to conclude that its interest in reducing its residents' demand for casino gambling would be advanced by placing limitations on casino advertising. *See* 478 U.S. at 341-42, 106 S.Ct. at 2977.

Again in *Metromedia*, the Court summarized this approach to the third prong of *Central Hudson* by noting that the reviewing court may be satisfied where the legislative judgment is "not unreasonable." 453 U.S. at 509, 101 S.Ct. at 2893. The Court applied that principle in upholding a ban on any billboard that constituted a distraction and therefore a hazard to traffic safety, even in the face of a claim that the record was "inadequate to show any connection between billboards and traffic safety." *Id.* at 508, 101 S.Ct. at 2893.

In each case where the Supreme Court affirmed the legislative judgment as reasonable, a logical correlation existed between the legislative objective and the means selected to achieve that objective. Thus in *Edge*, even though only 7.8% of Edge Broadcasting's listening public lived in North Carolina and even though that small population would still be subject to Virginia-based lottery advertisements, the Court concluded that North Carolina's anti-gambling policy would be advanced by prohibiting all lottery advertising by North Carolina-based facilities. *See* — U.S. at —, 113 S.Ct. at 2704. In *Posadas*, Puerto Rico's regulation prohibiting casinos from "advertis[ing] or otherwise offer[ing] their facilities to the public of Puerto Rico" was likewise found to advance Puerto Rico's interest in reducing its residents' demand for casino gambling. *Id.* at 341, 106 S.Ct. at 2976-77. Adding to the

obviousness of that logic, the Supreme Court noted that "the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view." *Id.* at 342, 106 S.Ct. at 2977 (citing the statement from *Central Hudson*, "There is an immediate connection between advertising and demand for electricity [the advertised product]. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales." 447 U.S. at 569, 100 S.Ct. at 2353).

In line with these precedents, we find that it was reasonable for the Baltimore City Council to have concluded that Ordinance 288's regulation of the outdoor advertising of alcoholic beverages directly and materially advances Baltimore's interest in promoting the welfare and temperance of minors. The City Council found that outdoor advertising is a unique and distinct medium which subjects the public to involuntary and unavoidable solicitation, and that children, simply by walking to school or playing in their neighborhood, are exposed daily to this advertising. The City Council pointed to its legislative finding that the majority of research studies show a definite correlation between alcoholic beverage advertising and underage drinking, while recognizing that not all studies have reached the same conclusion. There is a logical nexus between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson's* third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. If that were required, communities could never initiate even minor steps to address their problems, for they could never be assured of the success of their efforts. The proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends. Under that approach, we conclude that Baltimore has met its burden of satisfying the third prong of *Central Hudson*.

Each circuit that has considered the regulation of alcoholic beverage advertising has likewise concluded that the regulation of advertising is reasonably aimed at reducing demand. In Dunagin, the Fifth Circuit stated:

> We simply do not believe that the liquor industry spends a billion dollars a year on advertising solely to acquire an added market share at the expense of competitors. Whether we characterize our disposition as following the judicial notice approach taken in *Central Hudson Gas*, or following the "accumulated, common-sense judgment" approach taken in *Metromedia*, we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not "concrete scientific evidence" exists to that effect.

718 F.2d at 750. Similarly, in *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (10th Cir.1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984), the Tenth Circuit upheld a prohibition against advertising alcoholic beverages, stating:

> [W]e hold, as a matter of law, that prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems. The entire economy of the industries that bring these challenges is based on the belief that advertising increases sales.

Id. at 501, 101 S.Ct. at 2889. We now join these courts in holding that restricting the outdoor advertising of alcoholic beverages directly and materially advances the campaign against underage drinking.[5]

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[5] The rationale for the more general restriction prohibiting the advertising of alcoholic beverages, upheld in *Dunagin* and *Crisp*, may, however, be insufficient to support a general prohibition against price advertising of alcoholic beverages, even though such a restriction was upheld in *44 Liquormart, Inc.* v. *Rhode Island*, 39 F.3d 5 (1st Cir.1994), *cert. granted*, — U.S. —, 115 S.Ct. 1821, 131 L.Ed.2d 743 (1995). *Cf. Rubin* v. *Coors Brewing Co.*, — U.S. —, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995) (finding unconstitutional a labeling ban on the disclosure of alcohol content to combat "strength wars").

Turning to the fourth prong of the *Central Hudson* scheme, we must determine whether the government has demonstrated that its regulation of commercial speech "is not more extensive than is necessary" to serve the stated governmental interest. 447 U.S. at 556, 100 S.Ct. at 2343. In other words, the means selected to regulate speech must be narrowly tailored to serve a substantial state interest. *See Florida Bar*, — U.S. at —, 115 S.Ct. at 2375-77; *Board of Trustees of the State Univ. of New York* v. *Fox*, 492 U.S. 469, 478, 109 S.Ct. 3028, 3033-34, 106 L.Ed.2d 388 (1989). In assessing whether a regulation is narrowly tailored to serve the state's interest under an intermediate scrutiny framework, the Supreme Court has held that the fit between the regulation and the state's interest need not be perfect, but need only be reasonable. *See Fox*, 492 U.S. at 480, 109 S.Ct. at 3034-35. Summarizing the fourth prong of *Central Hudson*, the Court in *Fox* stated:

> What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

490 U.S. at 469, 109 S.Ct. at 1913 (citations and internal quotations omitted). Thus, if a regulation goes only "marginally beyond what would adequately have served the governmental interest," the regulation will not be invalidated; only when a regulation is "substantially excessive, disregarding far less restrictive and more precise means" will the regulation be invalidated under this prong of *Central Hudson*. *Fox*, 492 U.S. at 479, 109 S.Ct. at 3034 (citations and internal quotations omitted). And when there is no "far less restrictive and more precise means" available, the Court has accepted a broad ban of commercial advertising on the grounds that it was "perhaps the only effective approach." *Metromedia*, 453 U.S. at 508, 101 S.Ct. at 2893.

Satisfaction of the fourth prong of the *Central Hudson* test presents the closest question in this case. It is readily acknowledged that limitations on outdoor advertising of alcoholic beverages designed to protect minors also reduce the opportunities for adults to receive advertised information. And adults, who constitute a majority of the population, are not the object of the government's legislation. But it also appears that no less restrictive means may be available to advance the government's interest.

Anheuser-Busch argues that Baltimore could just as effectively advance its goal of promoting the welfare and temperance of minors by increasing enforcement of existing laws prohibiting sales to, and possession of alcoholic beverages by, minors, or by implementing and encouraging educational programs on the dangers of alcohol. These approaches might indeed prove beneficial in reducing underage drinking, but they do not provide an alternative to the approach selected by the City of curbing the enticement to consume alcoholic beverages. As the Supreme Court observed, quoting the Fifth Circuit in *Dunagin*:

> "We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of the dangers of alcohol . . . . The concern instead is that advertising will unduly promote alcohol consumption despite known dangers."

Posadas, 478 U.S. at 344, 106 S.Ct. at 2978 (quoting *Dunagin* v. *City of Oxford, Miss.*, 718 F.2d 738, 751 (5th Cir.1983) (en banc), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984)).

If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have it focus more efficiently on reaching minors, the City would have to consider those alternatives. But it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal. In the face of a problem as significant as that which the City seeks to

address, the City must be given some reasonable latitude. *See Posadas*, 478 U.S. at 346-47, 106 S.Ct. at 2979-80; *Metromedia*, 453 U.S. at 509, 101 S.Ct. at 2893; *Ohralik*, 436 U.S. at 455-56, 98 S.Ct. at 1918. Similar problems did not defeat the legislature's efforts in Posadas (where a ban that went substantially beyond the targeted population was upheld); in Edge (where a ban that was intended to apply to only 7.8% of the regulated company's listening public was upheld); or in Metromedia (where a ban on all billboards containing commercial advertising was upheld, even though some signs might not create a traffic hazard).

The problem of underage drinking is a most serious one that contributes significantly to a variety of social problems. Baltimore was faced with statistics showing that fully one-half of all deaths of minors were alcohol-related, and 40 to 50% of juveniles who drowned or had diving accidents had consumed alcohol immediately prior to the incident. The City Council found that alcohol is overwhelmingly and consistently the most widely used "drug" at all adolescent age levels. It pointed to data which showed that over half of all twelfth graders, 40% of tenth graders, and over a quarter of eighth graders reported that they consumed alcohol within the past 30 days. Widespread underage drinking was also found to be a major factor in crime. One-third of all juvenile males arrested said they had consumed alcohol within the previous 72 hours, and nearly 40% of all youths in adult correctional facilities reported drinking alcohol before committing their crime.

While it was readily recognized that regulating outdoor advertising would not wholly cure these problems, the regulation was one of the means recommended by the Governor's Prevention Commission, and it was responsive to numerous studies which link alcohol advertising and underage drinking. Through outdoor advertising, children are involuntarily and unavoidably confronted daily with the advertised message. *See Packer Corp.* v. *Utah*, 285 U.S. 105, 110, 52 S.Ct. 273, 274, 76 L.Ed. 643 (1932) (billboards are "seen without the exercise of choice or volition," and viewers have the message "thrust upon them by all the arts and devices that skill can produce"). The City argues that the only means to address this problem is to ban such advertising in locations where children generally walk and play. Such a ban still permits adults

to receive advertising messages and information from signs in commercial areas of the City and through the numerous other media to which adults are constantly exposed.[6]

Although no ordinance of this kind could be so perfectly tailored as to all and only those areas to which children are daily exposed, Baltimore's efforts to tailor the ordinance by exempting commercial and industrial zones from its effort renders it not more extensive than is necessary to serve the governmental interest under consideration. Accordingly, we find that Baltimore's Ordinance 288 limiting the location of outdoor billboards advertising alcoholic beverages in the City of Baltimore meets *Central Hudson's* fourth prong.

In summary, Baltimore City's regulation of stationary outdoor "advertising that advertises alcoholic beverages" in certain locations directly and materially advances a substantial governmental interest in promoting the welfare and temperance of minors who are involuntarily and unavoidably exposed to such advertisements. While the means selected of limiting the location of such outdoor advertising is not a perfect "fit" with the governmental objective, it nevertheless falls well within the range tolerated by the First Amendment for the regulation of commercial speech.

IV

In addition to their facial challenge of Ordinance 288, Anheuser-Busch and Penn Advertising contend that "as applied" the ordinance will impermissibly restrict *noncommercial* speech. They

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[6] It is noteworthy that for similar reasons the FCC has prohibited cigarette advertising on television and other electronic media. *See* Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1331 *et seq.* (upheld in *Capital Broadcasting Co.* v. *Mitchell*, 333 F.Supp. 582 (D.D.C.1971), *summarily aff'd. sub nom. National Assoc. of Broadcasters* v. *Kleindienst*, 405 U.S. 1000, 92 S.Ct. 1290, 31 L.Ed.2d 472 (1972)). Yet parents have more control over children's exposure to television than they have over children's exposure to outdoor advertising.

argue that the prohibition of outdoor "advertising that advertises alcoholic beverages" would prohibit their noncommercial public service messages which, they maintain, address issues of public interest. On "at least seven" of its billboards in Baltimore City, Anheuser-Busch has devoted a portion of its advertising display space to public service messages, such as "Let's stop underage drinking before it starts," and "Take a friend home for the holidays—friends know when to say when." These messages also include the corporate logo for Anheuser-Busch or a reference to "Budweiser."

There are no allegations that Baltimore considers these signs to fall under the ordinance as "advertising that advertises alcoholic beverages." Indeed, Anheuser-Busch's complaint was filed before the ordinance was to take effect, and as a result, the enforcement of the ordinance has been stayed. Furthermore, the City has indicated that it does not intend to enforce the ordinance against noncommercial speech.

In addressing this argument, the district court observed that whether the public service messages actually constitute noncommercial speech is arguable. The court assumed, without deciding, that the ordinance would not apply to legitimate public service messages, but was unwilling to "render an advisory opinion solely to distinguish between legitimate [public service messages] and true advertisements." 855 F.Supp. at 821. The question of whether speech both advertising a product and providing a public service message constitutes commercial speech is not well settled and may rest strictly on factual findings.

It is settled that commercial speech is speech which does "no more than propose a commercial transaction." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 66, 103 S.Ct. 2875, 2880, 77 L.Ed.2d 469 (1983) (citations and internal quotations omitted). But in *Bolger* the Court held that multi-page flyers published by a contraceptive manufacturing company to publicize the availability and desirability of contraceptives constituted commercial speech "notwithstanding the fact that they contain[ed] discussions of important public issues such as venereal disease and family planning." *Id.* at 67-68, 103 S.Ct. at 2881 (footnote omitted). The

Court explained, "We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Id.* at 68, 103 S.Ct. at 2881 (quoting *Central Hudson*, 447 U.S. at 563 n.5, 100 S.Ct. at 2350 n.5).

In this case, Ordinance 288 is directed only at commercial billboards advertising the sale of alcoholic beverages and does not facially regulate public service messages. The question of whether a particular billboard falls within the ordinance's proscription is, on the record before us, a hypothetical one. The City has not threatened to enforce its ordinance against such public service messages and has indicated that it does not intend to do so. Accordingly, we conclude that such an as-applied review of the ordinance must await an actual or threatened enforcement of the ordinance against a particular advertisement.

For the reasons stated, we affirm the judgment of the district court, upholding Baltimore City Ordinance 288 against a facial constitutional challenge under the First and Fourteenth Amendments.

AFFIRMED.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED December 11, 1996
No. 94-2141
CA-94-877-HM

PENN ADVERTISING OF BALTIMORE, INCORPORATED,

Plaintiff-Appellant

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, A Municipal Corporation; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Defendants-Appellees

THE AMERICAN ADVERTISING FEDERATION; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INCORPORATED; WASHINGTON LEGAL FOUNDATION; THE CITY OF CINCINNATI, OHIO; THE MARYLAND CONGRESS OF PARENTS & TEACHERS, INCORPORATED; THE COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS; CITY AND COUNTY OF SAN FRANCISCO; CITY OF SAN JOSE; UNITED STATES OF AMERICA

Amici Curiae.

No. 94-2141

On Petition for Rehearing with Suggestion
for Rehearing In Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc.

Senior Judge Butzner voted to grant panel rehearing. Judge Niemeyer and Judge Hamilton voted to deny.

No member of the Court requested a poll on the suggestion for rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Niemeyer for the Court.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX G

Baltimore Ordinance No. 307 (City Council Bill 627):

AN ORDINANCE concerning

ZONING CODE—ADVERTISING CIGARETTES

FOR the purpose of restricting the placement of outdoor advertisements for cigarettes; and providing a penalty.

BY adding
Article 30 - Zoning
Chapter 10 - Sign Regulations
Section 10.0-1i
Baltimore City Code (1983 Replacement Volume, as amended)

By repealing and reordaining with amendments
Article 30 - Zoning
Chapter 11 - Administration and Enforcement
Section 11.07
Baltimore City Code (1983 Replacement Volume, as amended)

Preamble

WHEREAS, Section 404 of Article 27 of the Maryland Code makes it unlawful for any person engaged in the manufacture or sale of cigarettes to sell, barter or give cigarettes to any individual under the age of 18 years; and

WHEREAS, More than three million minors under the age of 18 consume more than 947 million packs of cigarettes annually in the United States, yielding gross sales to the tobacco industry each year of approximately $1 billion; and

WHEREAS, Cigarettes are the most heavily advertised product in America, and the tobacco industry spends more than $421 million annually for outdoor advertising of cigarettes; and

WHEREAS, Outdoor advertisements are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation, as the Supreme Court recognized in Packer Corporation v. Utah, 285 U.S. 105 (1932) by citing with approval the following excerpt from the opinion of the Utah Supreme Court:

> "Advertisements of this sort are constantly before the eyes of observes on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard . . . . These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers and magazines."

WHEREAS, The Supreme Court and other courts have recognized the positive relationship between advertising and consumption as regards a variety of goods and services, such as electricity, see Central Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 569 (1980) ("There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales."); gambling, see Posades de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 341-42 (1986) ("The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one

. . . "; cigarettes, see Capital Broadcasting Co. v. Mitchell, 33 F. Supp. 582, 586 (D.D.C. 1971) (three-judge court) (noting "close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people."), aff'd per curiam, 405 U.S. 1000 (1972); and alcohol, see Dunagin v. City of Oxford, 718 F.2d 738, 747-51 (1983) (extensively reviewing evidence on connection between liquor advertising and consumption and rejecting inter-brand competition argument), cert. den., 104 S. Ct. 3533 (1984); and

WHEREAS, In addition to judicial recognition of the general link between advertising and consumption, there is specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors, including:

> Davis R. "Current trends in cigarette advertising and marketing". New England Journal of Medicine. 1987;316:725-732
>
> Chapman S., Fitzgerald B. "Brand preference and advertising recall in adolescent smokers: some implications for health promotion". American Journal of Public Health. 1982;72:491-494
>
> Klintzner M., Gruenewald PJ, Bamberger E. "Cigarette advertising and adolescent experimentation with smoking." British Journal of Addiction. 1991;86:287-298
>
> Goldstein AO, Fischer PM, Richards JW, Cretin BA. "Relationship between high school student smoking and recognition of cigarette advertisements." Journal of Pediatrics. 1987;110:488-491
>
> Hunter SM, Webber LS, Berenson GS. "Cigarette smoking and tobacco usage behavior

in children and adolescents: Bogalusa Heart Study." Preventive Medicine. 1980;9:701-712

Hunter Sm, Croft JB, Burke GL, Parker FC, Webber LS, Berenson GS. "Longitudinal patterns of cigarette smoking and smokeless tobacco use in youth: the Bogalusa Heart Study." American Journal of Public Health. 1986;76:193-195

Aitken PP, Leathar DS, O'Hagan FJ, Squair SI. "Children's awareness of cigarette advertising and brand imagery." British Journal of Addiction. 1987;82:615-622

Charlton A. "Children's advertisement awareness related to their views of smoking". Health Education Journal. 1986;45(2)75-78

Aitken PP, Leathar DS, Squair SI. "Children's awareness of cigarette brand sponsorship of sports and games in the UK". Health Education Research. 1987;1:203-211

Alexander HM, Calcott R., Dobson AJ, et al. "Cigarette smoking and drug use in school children, IV: factors associated with changes in smoking behavior". International Journal of Epidemiology. 1983;12:59-66

WHEREAS, The 1992 Maryland Adolescent Drug Survey conducted by the Maryland Department of Education found that:

Cigarettes are the second most commonly used substance by Maryland adolescents, with 41.9% of twelfth graders and 11.2% of sixth graders having used cigarettes in the twelve months preceding the study.

Cigarettes constitute a "gateway drug" among Maryland students, i.e., a substance which is used by adolescents as

a first drug and opens the door for use of other "harder" substances at a later date.

75% of twelfth graders first tried cigarettes before the age of 15.

By age 10 or under, 12.4% of males and 9.3% of females smoke.

Roughly 14% of twelfth graders smoke on a daily basis.

The percentage of Maryland students using cigarettes in the twelve months preceding the survey exceeds the national percentage by 13.6% for twelfth graders, 15% for tenth graders, and 12.1% for eighth graders.

Cigarette users were more likely than users of other substances described in the Survey to report having tried unsuccessfully to stop.

Cigarette use by sixth graders appears to be increasing with the percentage of sixth graders reporting having used cigarettes in the past thirty days increasing from 3.6% in 1988 to 4.7% in 1992.

4.7% of sixth graders, 14.4% of eighth graders, 22.7% of tenth graders, and 31.5% of twelfth graders reported use of cigarettes within the past 30 days.

Cigarettes are a "gateway" drug among Maryland students, i.e., a substance often used by adolescents as a first drug which appears to "open the door" for use of harder drugs at a later date; and

WHEREAS, An ordinance restricting the placement of advertisements for cigarettes in publicly visible locations within Baltimore City is a reasonable and necessary measure for reducing illegal consumption of cigarettes by minors; and

WHEREAS, The restrictions contained in the following Ordinance will not unduly burden legitimate business activities of persons licensed by the State of Maryland to sell cigarettes on a retail basis; and

WHEREAS, In order to protect legitimate business activities and to narrowly focus its efforts on those advertisements which most directly affect minors where they live, attend school, attend church and engage in recreational activities, the Baltimore City Council has determined not to restrict advertisements of cigarettes in certain designated business and industrial zones hereinafter identified, with reasonable and appropriate setbacks from adjoining zones; now, therefore,

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983) Replacement Volume, as Amended) be added, repealed, or amended, to read as follows:

ARTICLE 30—ZONING

Chapter 10—Sign Regulations.

10.0-1. General Requirements.

I. CIGARETTE ADVERTISEMENTS. NO PERSON MAY PLACE ANY SIGN, POSTER, PLACARD, DEVICE, GRAPHIC DISPLAY, OR OTHER FORM OF ADVERTISING THAT ADVERTISES CIGARETTES IN A PUBLICLY VISIBLE LOCATION. IN THIS SECTION "PUBLICLY VISIBLE LOCATION" INCLUDES OUTDOOR BILLBOARDS, SIDES OF BUILDING, AND FREESTANDING SIGNBOARDS. THIS SECTION SHALL NOT APPLY TO:

1. THE PLACEMENT OF SIGNS, INCLUDING ADVERTISEMENTS: (I) INSIDE ANY PREMISES USED BY A HOLDER OF A CIGARETTE BUSINESS "LICENSE" AS DEFINED IN SECTION 16-201(B) OF THE

BUSINESS REGULATION ARTICLE OF THE MARYLAND CODE; OR (II) ON COMMERCIAL VEHICLES USED FOR TRANSPORTING CIGARETTES;

2. ANY SIGN THAT CONTAINS THE NAME OR SLOGAN OF THE PREMISES USED BY A HOLDER OF A CIGARETTE BUSINESS LICENSE THAT HAS BEEN PLACED FOR THE PURPOSE OF IDENTIFYING SUCH PREMISES;

3. EXCEPT FOR BILLBOARDS AND FREESTANDING SIGNBOARDS, ANY SIGN FOR WHICH ZONING BOARD APPROVAL OR A MINOR PRIVILEGE PERMIT IS REQUIRE;

4. ANY SIGN THAT CONTAINS A GENERIC DESCRIPTION OF CIGARETTES;

5. ANY NEON OR ELECTRICALLY CHARGED SIGN ON PREMISES USED BY A HOLDER OF A CIGARETTE BUSINESS LICENSE THAT IS PROVIDED AS PART OF A PROMOTION OF A PARTICULAR BRAND OF CIGARETTES;

6. ANY SIGN ON AN MTA VEHICLE OR A TAXICAB;

7. ANY SIGN ON PROPERTY OWNED, LEASED OR OPERATED BY THE MARYLAND STADIUM AUTHORITY;

8. ANY SIGN AT MEMORIAL STADIUM;

9. ANY SIGN AT A FACILITY THAT OPERATES IN ACCORDANCE WITH A LICENSE ISSUED UNDER § 11-304 OF THE

BUSINESS REGULATION ARTICLE OF THE MARYLAND CODE;

10. ANY SIGN ON PROPERTY ADJACENT TO AN INTERSTATE HIGHWAY; OR

11. ANY SIGN LOCATED: (I) IN A B-4 ZONE, (II) IN A M-3 ZONE MORE THAN 1,000 FEET FROM THE BOUNDARY OF ANY OTHER ZONE WHICH IS NOT A B-4 OR M-3 ZONE, (III) IN A M-3 ZONE MORE THAN 500 FEET FROM THE BOUNDARY OF ANY OTHER ZONE WHICH IS NOT A B-4 OR M-3 ZONE PROVIDED SUCH SIGN FACES AWAY FROM ANY SUCH OTHER ADJOINING ZONE.

Chapter 11—Administration and Enforcement

11.07. Penalties for Violation.

Any person who violates, disobeys omits, neglects, refuses to comply with, or resists the enforcement of any of the provisions of this ordinance shall be guilty of a misdemeanor and, upon conviction in any court of competent jurisdiction, shall be fined not less than 25 nor more than 500 dollars; ANY PERSON FOUND GUILTY OF VIOLATING THE PROVISIONS OF SECTION 10.0-1I MAY BE FINED UP TO 1,000 DOLLARS. Every such person shall be deemed guilty of a separate offense for every day such violation shall continue after notification thereof.

SEC. 2. AND BE IT FURTHER ORDAINED, That this ordinance may only be applied to or interpreted to have an effect on any contract executed after the effective date of this ordinance and to any renewal term of a preexisting contract beginning after the effective date of this ordinance.

SEC. 3. AND BE IT FURTHER ENACTED, That this ordinance shall take effect on the 30th day after the date of its enactment.

Certified as duly passed this 28th day of February, 1994.

(Signed) Mary Pat Clarke

President, Baltimore City Council

Certified as duly delivered to His Honor, the Mayor, this 1st day of March, 1994.

(Signed) Leonard F. Wright

Chief Clerk

Approved this 7th day of March, 1994.

(Signed) Kurt L. Schmoke

Mayor, Baltimore City

APPENDIX H

Baltimore Ordinance No. 328 (City Council Bill 709):

AN ORDINANCE concerning

ZONING CODE — SIGNS

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983 Replacement Volume, as amended) be added, repealed, or amended, to read as follows:

ARTICLE 30 — ZONING

Chapter 10 — Sign Regulations

10.0-3. Signs in Business and Industrial Districts.

a. General Provisions.

7. At least 50% of the window area of each side of a building shall be free of signage, when such window area is associated with commercial use.

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Business and Industrial Districts:

7. Special standards for business signs on store fronts.

The owner or operator of a business premises, other than a gasoline service station, shall designate to the Zoning Administrator consolidated area(s) on which all signs for the premises shall be located. The consolidated area(s) shall not exceed the square footage permitted for all signs, minus the total area used by an identification or name plate sign. Permit application shall be made on a one-time basis for each area, and shall include descriptions or drawings of the consolidated display area(s), or shall comply with specific criteria established by the Zoning Administrator. Failure

to maintain the consolidated areas in conformity with approved descriptions and/or drawings shall cause the permit to terminate.

Chapter 13 — Rules and Definitions

13.0-2. Definitions.

74. Sign: any writing (including letter, word, or numeral), pictorial representation (including illustration or graphic), emblem (including symbol or trademark), flag (including banner or pennant), device, or any other figure of similar character which: (a) is a structure or any part thereof, or is attached to, painted on, or in any other manner represented on a building, window (this includes anything affixed to the interior and displayed in the space within twelve inches of the window), or other structure; and (b) is used to announce, direct attention, or advertise; and (c) is visible from outside a building. A sign shall not, however, include any writing, representation, or any figure of similar character within a building.

* * * *

APPENDIX I

Baltimore Ordinance No. 329 (City Council Bill 711):

AN ORDINANCE concerning

ZONING CODE — SIGNS

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983 Replacement Volume, as amended) be added, repealed, or amended to read as follows:

ARTICLE 30 — ZONING

Chapter 10 — Sign Regulations

10.0-3. Signs in Business and Industrial Districts.

a. General Provisions.

7. At least 50% of the window area of each side of a building shall be free of signage, when such window area is associated with commercial use.

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Business and Industrial Districts:

7. Special standards for business signs on store fronts.

The owner or operator of a business premises, other than a gasoline service station, shall designate to the Zoning Administrator consolidated areas on which all signs for the premises shall be located. The consolidated areas shall not exceed the square footage permitted for all signs, minus the total area used by an identification or name plate sign. Permit application shall be made on a one-time basis for each area, and shall include descriptions or drawings of the consolidated display area(s), or shall comply with specific criteria established by the Zoning Administrator. Failure

to maintain the consolidated areas in conformity with approved descriptions and/or drawings shall cause the permit to terminate.

8. Any sign on the side of a "licensed premises", as defined in Article 2B of the Annotated Code of Maryland, indicating the brand name and price of an alcoholic beverage product or a cigarette product available for sale within the "licensed premises" when permitted by any provision of this code or any other law or regulation now or hereinafter in force.

SEC. 2. AND BE IT FURTHER ORDAINED, That this ordinance shall take effect on the 30th day after the date of its enactment.

(2)

Supreme Court, U.S.
FILED
MAR 27 1997
OFFICE OF THE CLERK

No. 96-1429

In The

Supreme Court of the United States

October Term, 1996

PENN ADVERTISING OF BALTIMORE, INC.,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A MUNICIPAL CORPORATION; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; DAVID TANNER in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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24 pp

QUESTIONS PRESENTED

In an effort to reduce illegal consumption of cigarettes by minors, Baltimore enacted an ordinance which restricts the placement of publicly visible cigarette advertisements. The questions presented are:

1. In determining the First Amendment constitutionality of a speech restriction on promotional advertising, may the reviewing court judicially notice the principle that promotional advertising increases consumption, and, if not, should the predictive judgments of the legislature supporting the restriction receive judicial treatment as adjudicative or legislative facts?

2. Is a restriction against publicly visible cigarette advertising in areas where children live, attend school, and engage in recreation, more extensive than necessary to achieve the governmental purpose of reducing illegal cigarette consumption by minors?

3. Whether an ordinance that restricts the location, but not the content, of cigarette advertising on billboards is preempted under the Federal Cigarette Labeling and Advertising Act.

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BRIEF IN OPPOSITION

Respondents (collectively "Baltimore") urge that the petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fourth Circuit, entered 13 November 1996, be denied for the reasons set forth below.

STATEMENT

Baltimore incorporates by reference the statement of facts in the opinion of the Fourth Circuit in *Penn I.* App., 4a-7a.

All that was before the lower courts, and all that is before this Court, is Baltimore City Ordinance 307 (1994) (the "ordinance"). App., 84a-92a. Petitioner's ("Penn") reference to a "later ordinance," Pet., 2, which was not mentioned in its complaint nor considered by the courts below, is improper and unavailing.

The purpose of the ordinance, as asserted by Baltimore and as held by the courts below, is to facilitate compliance with the state law that precludes sale of cigarettes to minors. *See,* App., 39a (opinion of the district court), *id.,* at 11a-12a (opinion of the court of appeals).

REASONS FOR DENYING THE WRIT

I. THERE IS NEITHER APPARENT NOR ACTUAL CONFLICT BETWEEN THE FOURTH CIRCUIT'S DECISION AND THIS COURT'S DECISIONS

This case presents no compelling reason for review by this Court. The Fourth Circuit's decision was a correct application of the standards set forth in *Central Hudson* and its progeny, and was decided with faithful reference to *44 Liquormart*.

Furthermore, recent changes in federal law stongly militate against Supreme Court review of this case. Pursuant to 21 U.S.C. §360k(a), Baltimore's ordinance will become preempted on August 28, 1997, the effective date of new regulations issued by the United States Food and Drug Administration ("FDA") governing the sale, promotion, and distribution of cigarettes. *See*, 61 Fed. Reg. 44396, 44548-44549 (August 28, 1996). This case will become moot on August 28, 1997, subject to being resuscitated as a case or controversy only if Baltimore is granted an exemption from preemption pursuant to 21 U.S.C. §360k(b).[1]

A. The *Central Hudson* Third Prong

Rather than conflicting with decisions of this Court, the decision of the Fourth Circuit is quite apparently

---

[1] FDA's "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents" are discussed in further detail at pages 12-13, *infra*.

consistent with them. The lower court upheld the ordinance under the third prong of the *Central Hudson* test because "[a]fter our own independent assessment, we recognized" the reasonableness of Baltimore's legislative finding that there is a definite correlation between cigarette advertising and underage smoking. *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 327 (4th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3632 (U.S. March 10, 1997) (No. 96-1428), App., 50a (as adopted in *Penn II*, App. 2a). That holding is supported by a host of holdings and pronouncements from this Court. *See, Central Hudson*, 447 U.S. at 569 (third prong satisfied based on common sense); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981) (same) (plurality); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994) judicial obligation to exercise independent judgment when First Amendment rights are implicated is to assure itself that government adduces "either empirical support or at least sound reasoning on behalf of its measures") (citation omitted); *Edenfield v. Fane*, 507 U.S. 761 (1993) (citing with approval *Central Hudson*, 447 U.S. at 569 (*supra*)); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993) (third prong satisfied based on common sense); *Florida Bar v. Went For It, Inc.*, 115 S. Ct. at 2371, 2378 (1995) (empirical support justifying speech restrictions need not be "accompanied by a surfeit of background information," and speech restrictions may be upheld based on "simple common sense") (citation omitted); *44 Liquormart*, 116 S. Ct. at 1511 (Part VI) (Stevens, J., concurring) (commercial speech doctrine "recognize[s] some room for the exercise of legislative judgment").

In view of the demonstration which Baltimore made in the lower courts in support of its ordinance, and in view of the Fourth Circuit's "own independent assessment" of that demonstration, if the Fourth Circuit had done anything other than uphold the ordinance under the third prong of the *Central Hudson* test then its decision would have been directly in conflict with the decisions of this Court.

Baltimore met its burden under the *Central Hudson* third prong with both empirical support and sound reasoning. This Court has recently held that restrictions on commercial speech may be justified based on "simple common sense." *Florida Bar,* 115 S. Ct. at 2378. The common sense link between cigarette advertising on billboards and consumption of cigarettes by minors is self apparent. *Dunigan v. City of Oxford, Miss.*, 718 F.2d 738, 750 (5th Cir. 1983) (*en banc*), *cert. denied,* 467 U.S. 1259 (1984). *See also, Cal-Almond, Inc. v. United States Department of Agriculture,* 14 F.3d 429, 439 (9th Cir. 1993) ("The Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised.").

Cases relied upon by Penn, such as *Edenfield; City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Ibanez v. Florida Dept. of Business and Professional Regulation,* 512 U.S. 136 (1994); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995); and *44 Liquormart,* are all distinguishable from the instant case. Those cases did not involve, as this one does, a logical or common sense link between the speech restraint and the governmental interest sought to be advanced. In those cases, without evidence compensating for the lack of a logical or common sense link

between the means and the ends, the efficacy of the speech restraint could be defended with nothing more than speculation.

This case does not provide a vehicle for re-examination of this Court's assumption, as a matter of law, that advertising increases consumption. Baltimore relied on more than judicial notice and common sense to satisfy its burden; it relied on evidence placed before the court. The Fourth Circuit sustained Baltimore's law based on a legislative record containing much more than tidbits of evidence or speculation. The studies placed before the court below demonstrate that advertising of the type restricted by Baltimore's ordinance plays a unique and significant role in stimulating illegal consumption of cigarettes by minors. As the Fourth Circuit observed:

> Before enacting the ordinance, the Baltimore City Council conducted public hearings, receiving testimony and previously-conducted studies detailing the correlation between cigarette advertising and the consumption of cigarettes by minors. The City Council found, as expressed in the preamble to Ordinance 307, that cigarettes are the most heavily advertised product in America and that "there is specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors." It referred specifically to 10 studies and articles supporting that position. The City Council also relied on the 1992 Maryland Adolescent Drug Survey conducted by the Maryland Department of Education to support its conclusion that cigarettes are the second most commonly abused substance by Maryland adolescents, with approximately 42%

> of twelfth graders and 11% of sixth graders having smoked cigarettes in the previous 12 months. The City Council emphasized further that 75% of twelfth graders had smoked cigarettes before the age of 15. It noted that cigarettes constitute a "gateway drug" for Maryland students, as they are often the first drug used by adolescents and "appear[ ] to 'open the door' for use of other harder drugs at a later date." Therefore, to reduce the illegal consumption of cigarettes by minors, the City Council concluded that it would be reasonable to restrict the placement of publicly visible cigarette advertisements in the City.

App., 5a.

Although this Court would find the legislative record supporting Baltimore's ordinance sufficient to satisfy Baltimore's burden under *Central Hudson*, it would not thereby clarify the law. *Cf., Florida Bar*, 115 S. Ct. at 2378 ("we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information"). Thus, review of the determination of the lower court as to the sufficiency of the evidence adduced by Baltimore in support of its ordinance would not, respondents respectfully submit, be a prudent use of this Court's certiorari jurisdiction.

The record in *Central Hudson* was far less factually developed than the record in the instant case. The Court determined, however, based on common sense, that the state's interest in energy conservation was directly advanced by a regulation prohibiting advertising that promoted the use of electricity. 447 U.S. at 569. As this Court observed, "the Commission adopted the restriction

because it was *deemed likely* to 'result in some dampening of unnecessary growth' in energy consumption." *Id.* at 560 (quoting *Consolidated Edison Co. v. Public Service Comm'n.*, 47 NY2d 94, 101, 390 NE2d 749, 752 (1979)) (emphasis added). In deciding that the advertising restriction would lower demand for electricity, this Court pointed to no record evidence, and, indeed, there was no such evidence to support the regulation.

B. The *Central Hudson* Fourth Prong

The final question under *Central Hudson* is whether the regulation is "more extensive than is necessary to serve [the governmental] interest." 447 U.S. at 566. In *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989), this Court held squarely that this inquiry does not amount to a "least restrictive means" test. Instead, this Court's decisions require

> a " 'fit' between the [government's] ends and the means chosen to accomplish those ends," a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served [ ]"; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Id. at 480 (citations omitted).

The Court has elaborated on this approach in subsequent decisions, but it has never retreated from *Fox's* firm

rejection of a "least restrictive means" test. To the contrary, it has repeatedly reaffirmed that holding. *See, Edge,* 509 U.S. at 429-30, *Discovery Network,* 507 U.S. 410, 416-17 nn. 12-13 (1993); *Florida Bar,* 115 S. Ct. at 2380. Accordingly, a commercial speech restriction will fail the narrow-tailoring requirement only if it "burden[s] *substantially* more speech than necessary." *Edge,* 509 U.S. at 430 (emphasis added). The existence of "numerous and obvious less-restrictive alternatives" is a "relevant consideration," although not necessarily a dispositive one, in assessing the fit between the government's regulatory means and ends. *Discovery Network,* 507 U.S. at 417 n.13. Conversely, the continued availability of alternative channels to communicate the regulated speech weighs in favor of sustaining the regulation. *See, Florida Bar,* 115 S. Ct. at 2380-2381.

Penn asserts that the Fourth Circuit's decision conflicts with *44 Liquormart*. Pet., 17. Penn's argument proceeds from a misunderstanding of the basis for this Court's holding in *44 Liquormart,* and, more fundamentally, disregards obvious differences between this case and *44 Liquormart.*

In *44 Liquormart* the Court held that Rhode Island had failed to make the requisite showing because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the state's goal of promoting temperance." 116 S. Ct. at 1510 (Stevens, J.); *id.* at 1521-1522 (O'Connor, J.). In particular, the Court relied on Rhode Island's authority to raise the price of cigarettes directly, either through price regulation or taxation. *Id.* at 1510 (Stevens, J.); *id.* at 1522 (O'Connor, J.). Justice Stevens also noted that another alternative, an

educational campaign directed against cigarette consumption, "might" prove to be more effective than Rhode Island's indirect attempt to reduce consumption by prohibiting price advertising. 116 S. Ct. at 1510. He did not, however, conclude that an educational campaign in fact would be more effective, nor did he suggest that a state must undertake such a campaign before it can engage in commercial speech regulation.

While *44 Liquormart* makes clear that the availability of effective non-speech related regulatory alternatives is relevant to the final prong of *Central Hudson*, the decision does not hold that the bare existence of such alternatives will always be dispositive. *Central Hudson* and its progeny have never required the government to exhaust all conceivable regulatory alternatives to commercial speech restrictions. Tellingly, in *Edge* the Court sustained the federal restriction on broadcast lottery advertising under the fourth prong of *Central Hudson* without requiring a showing that educational campaigns against gambling had been undertaken or would be ineffectual. That holding in *Edge* survives *44 Liquormart*.

Rhode Island's unconstitutional price advertising ban proceeded from the misguided and paternalistic assumption that adults would use truthful commercial information unwisely. Baltimore's law, on the other hand, proceeds from the compelling interest which the City asserts in protecting children from advertising which induces them to consume a product that they are prohibited by law from consuming. Direct criminalization, however, has proven ineffective in curbing underage drinking. Baltimore's law was enacted in support of the government's unambiguous commitment (backed by the

criminal law) to zero tolerance of underage smoking, whereas Rhode Island's law was enacted as an indirect way for the state to affect drinking behavior without unambiguously committing itself to reducing cigarette consumption.

It is entirely legitimate under the First Amendment for the government to act "paternalistically" in order to protect children. *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2386 (1996) (for First Amendment purposes, "the protection of children is a 'compelling interest' "); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (same); *Ginsburg v. New York*, 390 U.S. 629, 639-41 (1968) (same). As a result, the government may legitimately seek to protect children from the harmful effects of information that adults have a First Amendment right to see and hear. *See, e.g., Ginsburg*, 390 U.S. at 634-41 (state may prohibit sale of non-obscene materials to minors because "the state has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' ").

The impact which Baltimore's ordinance has on the ability of adults to receive cigarette advertising is not constitutionally significant in view of the many alternative channels of communication left unrestricted by the ordinance. *Florida Bar*, 115 S. Ct. at 2380-2381; *44 Liquormart*, 116 S. Ct. at 1521 (O'Connor, J.). As observed by the Fourth Circuit, Baltimore's ordinance "does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available" for cigarette advertising. *Anheuser-Busch II*, App., 53a (as adopted in *Penn II*, App., 2a).

Nor, despite its citation to *Discovery Network,* can Penn sustain its argument that Baltimore's ordinance is unconstitutionally underinclusive. The ban on commercial newsracks in that case was struck down because such newsracks were no greater an eyesore than the non-commercial newsracks which were left unregulated, thus establishing that Cincinnati drew a distinction between commercial and non-commercial speech which bore no relationship whatsoever to the particular interest the City had asserted. 113 S. Ct. at 1508-1509. It is otherwise as to the distinction between outdoor advertising and the many other channels of communication which Baltimore's ordinance leaves free from restriction. Long ago this Court recognized that billboards are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation. *Packer Corp. v. Utah,* 285 U.S. at 110. It is the tendency of billboards to be immune from all attempts at parental supervision which motivated Baltimore to restrict billboards in particular.

Similarly, Penn's underinclusiveness argument, based on the ordinance's disparate treatment of various types of outdoor advertisements for cigarettes (Pet., 18), is foreclosed by *Metromedia* and *Edge.* In *Metromedia,* San Diego's billboard ordinance was attacked as impermissably underinclusive because of its failure to ban on-site as well as off-site advertising. This Court squarely rejected that argument: "[W]hether on-site advertising is permitted or not, the prohibition of off-site advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits on-site advertising." 453 U.S. at 511 (plurality opinion); *id.* at 551

(opinion of Stevens, J., concurring in part and dissenting in part).

Edge involved a federal statutory restriction barring radio broadcast of lottery advertisements by stations licensed in a non-lottery state. The purpose of the restriction was to protect state choice concerning lotteries. Edge Broadcasting Co. owned a station in North Carolina, a non-lottery state, but 92% of the station's audience was composed of residents from a populous city in nearby Virginia, a lottery state. Edge argued, and the lower courts held, that the advertising restriction was fatally underinclusive as applied to it because too much commercial speech about the Virginia lottery had been left unrestrained for the restriction to "directly advance" Congress' purpose. In rejecting that argument this Court held:

> We have no doubt that the fit in this case was a reasonable one. . . . [A]pplying the restriction to a broadcaster such as Edge directly advances the governmental interests. . . . *We think this would be the case even if it were true, which it is not, that applying the general statutory restriction to Edge, in isolation, would no more than marginally insulate the North Carolinians in the North Carolina counties served by Edge from hearing lottery ads.*

509 U.S. at 429-430 (emphasis added).

* * *

On August 28, 1996, the FDA published in the *Federal Register* "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents" (the "Rule"). 61 Fed. Reg. 44396

(1996). The Rule governs the sale, promotion, and distribution of nicotine-containing cigarettes in order to protect children and adolescents. FDA's decision to regulate cigarettes and smokeless tobacco to reduce the use of those products by persons under 18 was based on the most comprehensive rulemaking in the agency's history. To develop its proposed rule and jurisdictional analysis, the agency assembled and considered a record containing over 200,000 pages of factual and analytical materials. 61 Fed. Reg. 44557. After publishing the proposed rule and jurisdictional analysis on August 11, 1995, 60 Fed. Reg. 41314, 41453 (1995), FDA received over 700,000 comments from the public. 61 Fed. Reg. 44557. The Rule was supported by studies on the effect of cigarette advertising on children and adolescents. 60 Fed. Reg. 41314-41321.

The Rule, effective August 28, 1997, reduces the amount of imagery that makes cigarettes attractive to children and adolescents; limits advertising to which children and adolescents are exposed to text-only format; and bans outright advertising of tobacco products located within 1,000 feet of schools and playgrounds. *See*, 61 Fed. Reg. 44615-44618. Furthermore, pursuant to 21 U.S.C. §360k(a), Baltimore's ordinance will become preempted on August 28, 1997. This case will be mooted on that date, subject only to the possibility of being resuscitated as a case or controversy if the Secretary of Health and Human Services grants Baltimore an exemption from preemption pursuant to 21 U.S.C. §360k(b).

The Baltimore ordinance challenged in the instant case pales in significance compared to the sweeping federal regulation of cigarette advertising which has been adopted by the FDA. The time for this Court to wade into

the controversy over restricting cigarette advertising is not now; if it ever arrives the proper time will be when the Court is faced with a case involving a challenge to advertising restrictions of *national* scope, such as those adopted by the FDA.

Indeed, the constitutionality of the FDA's cigarette advertising regulations is currently the subject of four consolidated lawsuits pending in the United States District Court for the Middle District of North Carolina (Greensboro Division).[2]

II. THE FOURTH CIRCUIT CORRECTLY DECIDED AN ISSUE OF FIRST IMPRESSION ARISING UNDER THE PREEMPTION SECTION OF THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT

The second question presented in the petition concerns whether the Fourth Circuit erred in rejecting Penn's preemption argument under 15 U.S.C. § 1334(b). None of the reasons for Supreme Court review advanced by Penn withstand scrutiny.

There is no split of the circuits on the question presented in the petition. *Vango Media, Inc. v. City of New York*, 34 F.2d 68 (2nd Cir. 1994), involved significantly

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[2] *Coyne Beahm, Inc., et al. v. United States Food and Drug Administration, et al.*, (Case No. 2:95CV00591); *American Advertising Federation, et al. v. David A. Kessler, M.D., et al.*, (Case No. 2:95CV00593); *United States Tobacco Company, et al. v. United States Food and Drug Administration, et al.*, (Case No. 6:95CV00665); and *National Association of Convenience Stores, et al. v. David A. Kessler, M.D., et al.*, (Case No. 2:95CV00706).

different facts and issues from the instant case. In *Vango*, the Second Circuit held that a regulation of the *content* of cigarette advertising, requiring a minimum of one public health message to be displayed for every four tobacco advertisements displayed on property and facilities licensed by New York City, was preempted by 15 U.S.C. §1334(b).

The point of distinction between *Vango* and the instant case is captured in Judge Murray's opinion for the district court.

> But *Vango* substantially differs from the present case. The New York law required, as a condition of cigarette advertising, a different message regarding the health risks of smoking than the federally-mandated warning, thus brining the statute into conflict with the second stated purpose of the FCLAA. . . . Ordinance 307 does not require any message at all, let alone a message that conflicts with the one mandated by Congress.

App. 44a. *See also*, App. 10a-11a (court of appeals cites *Vango* with approval).

The decision of the Fourth Circuit does not subject cigarette manufacturers to any restriction concerning the content of their advertising, and thus cannot have a negative impact on the national economy and thereby upset the balance struck by Congress in 15 U.S.C. §1334(b). The language and legislative history of the Act make it abundantly clear that Congress was concerned only with protecting the tobacco industry from the chaos of local laws that would alter the content or regulate the message of cigarette commercials. Local or state content regulation would make it difficult to market cigarettes on a national

scale with national themes and messages. Baltimore's ordinance does not regulate content and thus poses no threat to Congress' purpose in enacting the preemption section.[3]

Furthermore, as this Court held in *Cipollone*, there is a strong presumption against preemption, and § 1334(b) must be narrowly construed. 505 U.S. at 516. In *Cipollone* the Court held that tort claims against cigarette manufacturers based on fraud and misrepresentation are not preempted because they are not "based on smoking and health" as that phrase of § 1334(b) is properly construed, but rather on a more general obligation – the duty not to deceive. *Id.* at 529. Similarly, as observed by the Fourth Circuit, since the Baltimore ordinance "simply restricts the location of cigarette-advertising signs, irrespective of the nature of the message communicated," the ordinance "neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health.*" App., 11a (emphasis in original). *Compare, Mangini v. R.J. Reynolds*

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[3] In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 513 (1992), this Court referred to a 1965 statement by renowned tobacco foe Senator Frank Moss of Utah, the floor leader who guided the 1969 Act through the Senate. Senator Moss stated that his own state was considering a cigarette warning label requirement, but that he "[did] not favor individual state action in this matter because of the maze of confusing regulations which would result." 111 Cong. Rec. 13901 (1965). Senator Moss never expressed any reservation about Utah's complete ban on any public display of cigarette ads on such media as billboards, transit signs, and point-of-sale displays that had been on the books for forty years and had always been enforced. Nor did anyone else. *See, Packer Corp. v. Utah*, 285 U.S. 105 (1932) *and* Utah Code Ann. § 76-10-102.

Tobacco Co., 875 P.2d 73 (Cal. 1994), *cert. denied*, 115 S. Ct. 577 (1994) (consumer's suit against cigarette manufacturer and its advertising agencies for injunctive relief, asserting claims of unfair business practices and unjust enrichment in connection with manufacturer's advertising campaign allegedly targeted at minors, held not preempted by 15 U.S.C. § 1334(b)).[4]

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[4] As observed in both *Cipollone* and *Mangini*, the Senate Report regarding the 1969 Act emphasized that 15 U.S.C. Section 1334(b) is narrowly phrased to preempt only state action based on smoking and health, but "[i]t would in no way affect the power of any State . . . with respect to the taxation of *the sale of cigarettes to minors*, or the prohibition of smoking in public buildings, or *similar police regulations*. S. Rep. No. 91-566, p. 12 (1969) (emphasis added). *See, Cipollone*, 505 U.S. at 529 n.26; *Mangini*, 875 P.2d at 81.

In *Mangini* the court also observed that Congress has enacted legislation allowing certain monetary grants to states, but "only if the State involved has in effect a law providing that it is illegal for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18, and "will enforce" that law. 42 U.S.C. § 300x – 26(a), (b). A state receiving such a grant must agree to develop "strategies to discourage the use of . . . tobacco products by individuals to whom it is unlawful to sell or distribute such products." 42 U.S.C. § 300x – 22(b)(2)(B), *quoted in Mangini*, 875 P.2d at 82.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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OCTOBER TERM, 1996

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondents has declined to consent to the filing of the brief, thereby necessitating the filing of this motion.

WLF is a nonprofit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation in a variety of areas, WLF devotes a substantial portion of its resources to protecting the right of commercial free speech. To that end, WLF has appeared before this Court as well as other federal and state courts in cases raising commercial speech issues. *See, e.g., 44 Liquormart, Inc. v. Rhode Island,* 116 S. Ct. 1495 (1996); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois,* 496 U.S. 91 (1990). WLF also filed a brief in support of the certiorari petition filed by Petitioner the last time this case came before the Court. *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore City,* 116 S. Ct. 2575 (1996) (*petition granted, vacating and remanding* 63 F.2d 1318 (4th Cir. 1995)).

WLF is concerned that the Fourth Circuit's rationale in this case, if followed widely by lower courts and other circuits, could lead to widespread denial of commercial speech rights. The Fourth Circuit's approach to the third and fourth prongs of the *Central Hudson* test not only upheld a content-based ban on expression, but did so without even a minimal opportunity for Petitioner to engage in discovery and to present evidence.

WLF has no direct interest in the outcome of this case, other than an interest in establishing the principle that the First Amendment rights of commercial speakers should be broadly construed. Accordingly, WLF believes that it brings to the case a perspective that differs from that of any party, and that its brief will be of assistance to the Court in deciding this case.

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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April 9, 1997

QUESTION PRESENTED

Amicus curiae will address the following question only:

Whether a restriction on truthful, non-misleading commercial speech may be upheld where the reviewing court asked only whether the legislature could have found a "logical nexus" between the restriction's means and ends, and made no independent inquiry into whether the restriction either would in fact materially advance its goal or was narrowly tailored to do so.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set out fully in the Motion for Leave to File accompanying this brief.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement contained in Petitioner's brief.

In brief, Baltimore City in 1994 enacted an amendment to its zoning law (the "Ordinance") which bans (with numerous exceptions) outdoor advertising of cigarettes in most areas of the city. The Ordinance's stated purpose is to reduce illegal smoking by minors. Exempted from the ban are, among other locations, the windows and exteriors of retail outlets licensed to sell cigarettes and the exteriors of public buses, taxicabs, and cigarette delivery trucks. Petition Appendix ("Pet. App.") 84a-92a. Nor does the Ordinance limit other forms of advertising commonly used for cigarettes (*e.g.*, television, radio, newspapers, and magazines).

Petitioner Penn Advertising of Baltimore, Inc. (a company engaged in the business of displaying outdoor advertising) filed suit in 1994 seeking, *inter alia*, a judgment that the Ordinance violates its First Amendment rights to engage in commercial speech and is preempted by § 5(b) of the Cigarette Labeling and Advertising Act. 15 U.S.C. § 1334(b).[1]

On August 11, 1994, the U.S. District Court for the District of Maryland granted summary judgment to Respondents. Pet. App. 15a-47a. Although the parties sharply disputed the purpose of the Ordinance (an issue central to Petitioner's federal preemption claim) and the

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[1] Section 1334(b) provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of . . . cigarettes."

relationship between cigarette advertising and consumption (an issue central to Petitioner's First Amendment claim), the district court treated the Ordinance's statement of purpose as conclusive and the relationship between advertising and smoking as "self-evident." The district court held (despite evidence to the contrary submitted by Petitioner) that the Ordinance would materially advance Respondents' (referred to herein collectively as "Baltimore City") goal of reducing smoking by minors, finding that courts may properly "defer to a legislative judgment that advertising increases consumption." *Id.* at 21a. The district court also rejected Petitioner's federal preemption argument and its argument that the Ordinance was insufficiently narrowly tailored, and denied Petitioner's request for discovery prior to decision. *See id.* at 6a.

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed. Pet. App. 3a-14a. *Penn Advertising I.* Relying on its decision in a companion case that addressed a First Amendment challenge to a similar ordinance that banned most outdoor advertising of alcohol beverages in Baltimore,[2] the Fourth Circuit held that the Ordinance could be upheld in the face of First Amendment challenge without the need to look beyond the findings made by the Baltimore City Council when it adopted the Ordinance. The appeals court held that the Ordinance's restrictions on commercial speech survived scrutiny under the third prong of this Court's *Central Hudson* test because Baltimore City "reasonabl[y]" believed that the Ordinance would reduce underage smoking. The court also found that the Ordi-

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[2] *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City [Anheuser-Busch I]*, 63 F.3d 1305 (4th Cir. 1995), *cert. granted, judgment vacated*, 116 S. Ct. 1821, *on remand*, 101 F.3d 325 (4th Cir. 1996).

nance survived *Central Hudson*'s fourth prong -- that the Ordinance be "not more extensive than is necessary" to serve the stated governmental interest -- because the alternatives suggested by Petitioner (including increased enforcement of the ban on sales to minors) would not serve to screen minors from outdoor cigarette advertising. *Id.* at 12a-13a.

Following the Court's decision in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), the Court granted Petitioner's petition for a writ of certiorari, vacated the Fourth Circuit's judgment, and remanded the cases to the Fourth Circuit for reconsideration in light of *44 Liquormart*. Pet. App. 15a.

On remand, the Fourth Circuit (by a 2-1 vote) "re-adopt[ed]" its prior opinion and again affirmed the district court's dismissal. Pet. App. 1a-2a. *Penn Advertising II*. In a one-paragraph opinion, the appeals court stated, "[W]e conclude that *44 Liquormart* does not require us to change our decision in this case," for the reasons stated in *Anheuser-Busch I*, as modified by *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City [Anheuser-Busch III]*, 101 F.3d 325 (4th Cir. 1996).[3]

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[3] The only significant difference between *Anheuser-Busch I* and *Anheuser-Busch II* concerned this Court's decision in *Posadas v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). *Anheuser-Busch I* had relied heavily on *Posadas*, but *44 Liquormart* called into question *Posadas*'s continued viability by questioning the *Posadas* Court's willingness to defer to legislative judgments regarding the scope and effectiveness of commercial speech restrictions. In light of *44 Liquormart*'s criticism of *Posadas*, the appeals court stated in *Anheuser-Busch II* that it was no longer relying on *Posadas* in deciding to uphold the Ordinance. *Anheuser-Busch II*, 101 F.3d at 327 n.*.

The appeals court distinguished *44 Liquormart* by arguing that that case involved a far more extensive speech restriction. The court noted that Baltimore had banned only one form of alcohol advertising and one form of cigarette advertising (billboards in most areas of the city) and had targeted only those individuals prohibited from purchasing such products, while in *44 Liquormart* Rhode Island had banned alcohol price advertising "in any form whatsoever" and had targeted *all* consumers including "legal users." *Anheuser-Busch II,* 101 F.3d at 328. The appeals court also held that Baltimore's focus on protecting children and juveniles served to distinguish its commercial speech restrictions from the law struck down in *44 Liquormart* because this Court has "repeated[ly] recogni[zed] that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media." *Id.* at 329. The court held that the commercial speech restrictions actually fostered First Amendment values because "far from undermining the free dissemination of information to independently choosing consumers, Baltimore's ordinance supports the full development of its young so that they will be able to assess their market options intelligently and independently." *Id.*

Finally, the Fourth Circuit also attempted to distinguish *44 Liquormart* by arguing that the ordinances qualified as "time, place, or manner" speech restrictions because they permitted outdoor advertising of tobacco and alcohol beverages at some locations and because they permitted manufacturers to advertise their products via other media. *Id.*

Judge Butzner dissented from the panel's decision; he would have remanded the case for an evidentiary hearing.

Pet. App. 2a. Judge Butzner argued that the courts could not, in the absence of a fully developed factual record, determine whether the Ordinance could survive scrutiny under the third and fourth prongs of the *Central Hudson* test. *Anheuser-Busch II*, 101 F.3d at 330-32.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DEFERENTIAL APPROACH TO COMMERCIAL SPEECH RESTRICTIONS IS UNTENABLE AFTER *44 LIQUORMART*

The burden is on the government to justify regulation of commercial speech that concerns a lawful activity and is not misleading. *Edenfield v. Fane,* 113 S. Ct. 1792, 1800 (1993). A municipality must: (1) demonstrate a substantial interest in support of its regulation; (2) demonstrate that the regulation advances that interest "in a direct and material way"; and (3) demonstrate that the regulation is narrowly tailored -- *i.e.*, that the restriction on commercial speech "is in reasonable proportion to the interest[] served." *Id.* at 1798. As the Fourth Circuit correctly recognized, the dispute in this case revolves around whether Baltimore has proper justification for its Ordinance under the latter two of those factors -- commonly known as the third and fourth prongs of *Central Hudson*'s four-prong standard of review for commercial speech.[4]

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[4] As noted above, Petitioner has also raised a federal preemption challenge to the Ordinance. While WLF supports granting certiorari on the preemption issue as well, this brief focuses solely on why certiorari should be granted to address Petitioner's First Amendment claims.

The Fourth Circuit, in determining in *Penn Advertising I* that the Ordinance met the *Central Hudson* test for the restriction of commercial speech, stated:

> There is a *logical nexus* between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation exists, or that the steps undertaken will solve the problem. . . . The proper standard for approval must involve an assessment of the *reasonableness* of the legislature's *belief* that the means it selected will advance its ends.

Pet. App. 13a (quoting *Anheuser-Busch I*, 63 F.3d at 1314-15)(emphasis added). On this basis, the Fourth Circuit refused to consider even the barest contrary evidence that Petitioner submitted.

In interpreting *Central Hudson*'s standard as one requiring only a "logical nexus" and a "reasonable belief" that the means will directly and materially advance the end, the Fourth Circuit reduced the *Central Hudson* test from one of "intermediate scrutiny" to one of mere "rational basis" review, as evidenced by its refusal to even look at contrary, compelling evidence. Such an approach flies in the face of this Court's pronouncements regarding the proper review of commercial speech regulations: the legislature is required to "demonstrate that the harms it recites are real and that a restriction will in fact alleviate them to a material degree." *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995)(quoting *Edenfield*, 113 S. Ct. at 1800). *See also Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2089 (1994).

Any doubt about the exacting standard of review required for commercial speech restrictions was eliminated by *44 Liquormart*. Indeed, *Anheuser-Busch I*'s deferential standard of review was derived almost entirely from *Posadas*, a decision effectively overruled in pertinent part by *44 Liquormart*. As Justice Stevens (writing for himself and Justices Kennedy, Thomas, and Ginsburg) explained in *44 Liquormart:*

> Our commercial speech cases recognize some room for the exercise of legislative judgment. *See Metromedia, Inc. v. San Diego,* 453 U.S. 490, 507-508 (1981). However, Rhode Island errs in concluding that *Edge* [*United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993)] and *Posadas* establish the degree of deference that its decision to impose a price advertising ban warrants. . . .
>
> Because the 5-to-4 decision in *Posadas* marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is the final arbiter, we decline to give force to its highly deferential approach.
>
> Instead, in keeping with our prior holdings, we conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate.

44 Liquormart, 116 S. Ct. at 1511. Justice O'Connor (writing for four other Justices) agreed. *Id.* at 1522. There is no allegation that Petitioner's advertising contains anything other than truthful, nonmisleading information; Baltimore City seeks to suppress it solely because of the

City's belief that minors would be better off not being exposed to it. Accordingly, the Fourth Circuit clearly erred in *Penn Advertising I* and *II* when it concluded that Baltimore City's "reasonable belief" that the Ordinance would directly and materially advance the goal of reducing smoking by minors was sufficient to immunize the Ordinance from attack under the *Central Hudson* test's third prong.

The Fourth Circuit's analysis of *Central Hudson*'s fourth prong was equally faulty. The appeals court simply refused to consider Petitioner's suggested alternatives for achieving Baltimore City's goals, alternatives that did not involve regulating speech. Pet. App. 13a-14a. Justifying that refusal required significant judicial sleight-of-hand; where previously the City's legislative goals had been identified as reducing smoking by minors, now the goal was identified as "curbing the enticement" for underage drinking and smoking. *Anheuser-Busch I,* 63 F.3d at 1316 (incorporated by reference in *Penn Advertising I,* Pet. App. 13a-14a). Obviously, the only way to curb enticements is to suppress speech; such suggested alternatives as stricter enforcement of the underage sales ban almost surely (as the Fourth Circuit conceded) would reduce underage drinking and smoking, but the Fourth Circuit deemed the alternatives insufficiently comparable to the Ordinance because they would do nothing to curb *enticements* for underage drinking and smoking. *Id.* However, Baltimore City has never identified as its legislative goal a desire to eliminate truthful, nonmisleading speech because such speech constitutes an enticement to minors to smoke cigarettes. Rather, Baltimore City's goal has been to reduce underage smoking, and thus Petitioner was improperly prohibited from discovering and presenting evidence that the goal

could be equally well achieved without resorting to speech restrictions.

The Fourth Circuit attempted in *Penn Advertising II* to bolster its initial decision by suggesting (by reference to its opinion in *Anheuser-Busch II*) that First Amendment scrutiny be relaxed when commercial speech restrictions are designed for the protection of children. The appeals court stated:

> This decision thus conforms to the Supreme Court's repeated recognition that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through the commercial media.

Anheuser-Busch II, 101 F.3d at 329.

Even if the panel is correct that there exists a "special solicitude in the First Amendment balance" that permits otherwise impermissible speech restrictions to be imposed in the name of child welfare,[5] that conclusion does not obviate the need for courts to subject all commercial speech

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[5] WLF notes that the Court has declined other invitations to reduce, in certain classes of cases, the exacting level of review normally applied to commercial speech restrictions. The Court has declined, for example, to relax the level of review when the product being advertised is alleged to constitute a vice. *See Rubin v. Coors Brewing Co.*, 115 S. Ct. at 1590-91 n.2; *44 Liquormart*, 116 S. Ct. at 1513 (Stevens, J.). Moreover, the Court has rejected broad commercial speech bans even when their purpose was to protect children from the speech, noting that under the First Amendment the "government may not reduce the adult population . . . to reading only what is fit for children." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 (1983).

restrictions to the four-pronged analysis set forth in *Central Hudson.* A speech restriction is not immunized from judicial review based simply on legislative assertions that the restriction will materially advance the cause of child welfare; *44 Liquormart* makes clear that, when challenged, government regulators must demonstrate that their speech restrictions materially advance their stated objective (regardless how noble the objective) and do so in a narrowly tailored manner. The cases cited by the appeals court -- which deal almost exclusively with FCC broadcast restrictions -- lend no support to the panel's contention that close scrutiny of speech restrictions is unnecessary when the government is seeking to protect children.

Penn Advertising II's analysis of *44 Liquormart* makes little sense when one considers that Rhode Island, as does Maryland, prohibits the purchase of alcohol beverages by those under 21 and the purchase of cigarettes by minors. The Court was willing to accept Rhode Island's contention that a price advertising ban leads to *some* reduction in consumption (albeit not necessarily a *material* reduction), *44 Liquormart,* 116 S. Ct. at 1509, and by extension presumably would also have accepted a contention that a price advertising ban serves to reduce consumption among all age groups, including those under 21. Yet, it is difficult to believe that the unanimous *44 Liquormart* court would have reversed its decision if Rhode Island had merely announced that its price advertising ban was designed to reduce underage drinking. Accordingly, Baltimore City's expressed goal of protecting choldren does not serve to distinguish this case from *44 Liquormart*; at the very least, *44 Liquormart* requires that Petitioners be permitted an opportunity to gather and present evidence that the Ordinance will not materially advance the cause of child welfare and is not narrowly tailored to achieve that goal.

The straying of the Fourth Circuit from this Court's commercial speech review standards is not unique and thus merits plenary review. Since *Central Hudson,* lower courts have exhibited some confusion regarding the third and fourth prongs and the requisite level of judicial review. The Ninth Circuit has applied a relatively strict level of review in such cases. *Nordyke v. Santa Clara County,* ___ F.3d ___, 1997 U.S. App. LEXIS 6303 (9th Cir. 1997). The Fifth and Tenth Circuits, on the other hand, appear to share at least some of the Fourth Circuit's willingness to grant the legislative branch considerable deference in commercial speech cases. *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 747 (5th Cir. 1983), *cert. denied,* 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691 (1984).

The deferential approach to commercial speech restrictions has reached its nadir here. The Fourth Circuit's summary dismissal of Petitioner's First Amendment challenge to a regulation of protected commercial speech is apparently without precedent. WLF therefore respectfully urges this Court to grant certiorari for purposes of clarifying how the lower courts should exercise the scrutiny required under *Central Hudson* and how governments seeking to regulate commercial speech can meet the burden of proof imposed by *Central Hudson.*

II. THE ORDINANCE MAY NOT BE DEFENDED AS A "TIME, PLACE, OR MANNER" RESTRICTION ON SPEECH, BECAUSE IT IS NOT CONTENT-NEUTRAL

In *Penn Advertising II* and *Anheuser-Busch II,* the Fourth Circuit attempted to shore up its analysis by asserting for the first time that Baltimore City's commercial speech restrictions are valid as "time, place, or manner" restrictions on speech. Pet. App. 2a (incorporating, *Anheuser-Busch II,* 101 F.3d at 329). That assertion is without merit; the Ordinance does not qualify as a "time, place, or manner" speech restriction because it is not content-neutral, and this Court has never indicated a willingness to import into commercial speech cases the deferential standard of review employed in "time, place, or manner" cases when examining legislative findings.

The Court has explained "time, place, or manner" speech restrictions as follows:

> [T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Nonviolence,* 468 U.S. 288, 293 (1984).

Regardless whether Baltimore City could demonstrate that it can meet the second and third requirements of a

valid "time, place, or manner" restriction on speech (narrow tailoring and alternative channels for communication), Baltimore clearly cannot meet the content-neutrality requirement. The Ordinance is not content-neutral under any commonsense definition of that term: it prohibits some outdoor signs and permits others based solely on their content. The Fourth Circuit thought that the Ordinance qualified as a time, place, or manner restriction because Baltimore City does not altogether ban outdoor advertising of cigarettes but rather limits the number of places where such signs can be posted; and also because Baltimore City permits advertising of cigarettes through other media. Pet. App. 27a (incorporating *Anheuser-Busch II,* 101 F.3d at 329). But in the absence of evidence that Baltimore City imposes similar "place" restrictions on commercial signs advertising other types of products, the Ordinance cannot be said to be "content-neutral" and thus cannot be upheld as a "time, place, or manner" restriction.

Indeed, the Court rejected a very similar "time, place, or manner" argument in *Linmark Assoc. Inc. v. Township of Willingboro,* 431 U.S. 85 (1977). *Linmark* involved an ordinance prohibiting the display of "for sale" signs on the front lawns of private residences. The Court held that the ordinance could not be defended as a "time, place, or manner" speech restriction because the municipality did not prohibit display of other types of signs on front lawns -- and thus the ordinance failed the content-neutrality requirement. *Linmark,* 431 U.S. at 93-94.

In their various briefs in this case, Respondents have cited to several of the Court's "time, place, or manner"

decisions and "*O'Brien* content-neutral" decisions[6] to support the Fourth Circuit's contention that the courts should defer to legislative findings regarding the effectiveness of commercial speech restrictions in furthering the legislature's goals. *See, e.g.*, Respondents' *Anheuser-Busch* Brief at 7 (*citing Turner Broadcasting System, Inc. v. FCC [Turner I]*, 512 U.S. 622 (1994)). But the Court has never indicated that the deference afforded legislatures in cases involving "time, place, or manner" speech restrictions or "*O'Brien* content-neutral" restrictions has any place in cases involving content-based commercial speech restrictions. Indeed, in an "*O'Brien* content-neutral" decision issued just last week, the Court repeatedly emphasized that the substantial deference it was affording to congressional findings regarding the cable television industry would not have been granted had the speech restrictions at issue not been content-neutral. *Turner Broadcasting System, Inc. v. FCC [Turner II]*, ___ U.S. ___, 65 U.S.L.W. 4209, 4211 (March 31, 1997); *id.* at 4222 (Stevens, J., concurring)("If this statute regulated the content of speech rather than the structure of the market, our task would be quite different."); *id.* at 4222-23 (Breyer, J., concurring in part). Respondents' reliance on *Turner I* misses the mark for the additional reason that *Turner I* deferred to legislative findings to a far lesser extent than did the Fourth Circuit in this case. The Fourth Circuit held that Respondents were entitled to summary judgment even before Petitioner was given a complete opportunity to gather and present

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[6] In "*O'Brien* content-neutral" decisions, the Court has held that a content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

evidence. By way of contrast, despite ruling that substantial deference should be afforded the congressional findings at issue, *Turner I* vacated a judgment against those raising First Amendment challenges and remanded the case to permit them to engage in additional factfinding.

In sum, the Fourth Circuit's invocation of the "time, place, or manner" doctrine as an additional ground for upholding the Ordinance is a significant misapplication of that doctrine. The Court should grant the petition for certiorari in order to correct that error.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the Petition.

Respectfully submitted,

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No. 96-1429

In the Supreme Court of the United States

OCTOBER TERM, 1996

PENN ADVERTISING OF BALTIMORE, INC.,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A Municipal Corporation; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

A. The Ordinance Cannot Survive Scrutiny Under The First Amendment

Baltimore's opposition to the petition in this case entirely misses the point of the first question presented. Our submission is that a court addressing a First Amendment challenge to a regulation of commercial speech cannot content itself with determining, on the basis of the legislative record, whether the legislature acted rationally in concluding that the restriction would advance the government's aims. Baltimore does not deny that the court of appeals in this case took precisely that deferential approach in determining the constitutionality of the ordinance;[1] the court took no account of the conflicting evidence on the question whether the ordinance would be effective, did not allow for the development of a meaningful record on the point, and made no inquiry into whether the ordinance would "'in fact alleviate [the targeted harms] to a material degree.'" *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995) (citation omitted). The question whether this approach is correct presents a recurring issue of enormous practical importance.

1. In arguing that the ordinance satisfies the third prong of the *Central Hudson* test — which requires the government to show "'not merely that its regulation will advance its interest, but also that it will do so to a material degree'" (*44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495, 1509 (1996), quoting *Edenfield* v. *Fane*, 507 U.S. 761, 771 (1993)) — Baltimore principally relies on what it labels the "common sense link" between advertising and underage smoking. Br. in Opp. 4. The City adds that there is no need for "re-examination of this Court's assumption, as a matter of law, that advertising increases consumption." *Id.* at 5. But this

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[1] The Fourth Circuit stated that it conducted an "independent assessment" of the ordinance, and Baltimore repeats (at Br. in Opp. 3) that statement. We explained in the petition (at 10 n.7), however, that the court of appeals took an "independent" look only at whether the legislature could reasonably have believed that the ordinance would be effective; the court did not itself conduct *any* inquiry into whether the ordinance would be effective, or was narrowly tailored to achieve its goals. Baltimore does not take issue with our characterization of the holding below on this point.

Court *already* has rejected the assumption that a "common sense link" of this sort suffices to justify a restriction on commercial speech, making clear in *44 Liquormart* that a "more searching[]" examination of the speech restriction is necessary. 116 S. Ct. at 1522 (O'Connor, J., concurring in the judgment). See Pet. 12.

The point is proved by the very cases cited by Baltimore at Br. in Opp. 4. Surely the "common sense link" between municipal esthetics and proliferating outdoor newsracks, or between alcohol beverage price advertising and excessive drinking, is at least as powerful as the association between billboard advertising and smoking by minors. Yet the Court invalidated the newsrack restriction challenged in *City of Cincinnati* v. *Discovery Network*, 507 U.S. 410 (1993), and the alcohol beverage advertising regulation at issue in *44 Liquormart*, because the government failed in both cases to make a factual showing that its "common sense" suppositions were in fact well founded, *i.e.*, that the speech bans actually would be effective or were narrowly tailored.

Moreover, Baltimore's assumptions about common sense, even if well founded as a generality, miss the mark in this case because not directed to the specific speech restriction here at issue. There is no basis whatever for Baltimore's assertion (Br. in Opp. 5) that "[t]he studies placed before the court below demonstrate that advertising of the type restricted by Baltimore's ordinance plays a unique and significant role in stimulating illegal consumption of cigarettes by minors." In fact, we explained in the petition — and Baltimore does not deny — that there is *no* evidence *anywhere* (and certainly not in the record here) that *billboard* advertising increases smoking by minors (see Pet. 14); that there is no reason to suppose that the ordinance will produce *any* net reduction in the amount of tobacco advertising to which youths are exposed (the record actually is to the contrary) (see Pet. 15); and that any small reduction in the volume of advertising that did result from the ordinance would have no material effect because tobacco advertising is permitted in many other media (see Pet. 15-16).[2] In

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[2] Baltimore evidently concedes this point, for the City argues elsewhere that the impact of the ordinance on adults will be insignificant "in view of the many alternative channels of communication left unrestricted by the

this setting, the City makes no response at all to the argument in the petition (at 16) that this case is identical to *Discovery Network* and is indistinguishable in principle from *Valley Broadcasting Co.* v. *United States*, 1997 U.S. App. LEXIS 3291 (9th Cir. Feb. 15, 1997).

2. Baltimore's argument under the fourth prong of the *Central Hudson* test, which requires that a commercial speech restriction be narrowly tailored, effectively acknowledges that the holding below is inconsistent with this Court's decisions. The City recognizes that, at a minimum, the availability of alternative, non-speech-restricting means of achieving the government's goal is "relevant" to the fourth prong inquiry. Br. in Opp. 8, 9. But the Fourth Circuit held that such non-speech alternatives are wholly *irrelevant*, refusing even to consider the possibility that educational campaigns or enhanced enforcement of existing prohibitions would be as (or more) effective than a speech ban in discouraging underage smoking. See Pet. App. 13a-14. This is so even though — as we note in the petition (at 18 & n.14) and as Baltimore does not deny — there is compelling evidence that such alternatives *would* be effective.[3]

Baltimore gets no more support from its related argument that the ordinance is justified as an exercise in paternalism that is intended to protect minors. As we argued in the petition (at Pet. 22), while the *purpose* of protecting children surely is a substantial one, simply invoking that purpose does not relieve the government of the obligation to show that its restriction on speech is narrowly

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ordinance." Br. in Opp. 10. In an age when minors have ready access to the Internet (not to mention newspapers, magazines, and the many outdoor signs that are unaffected by the ordinance), Baltimore offers no reason to believe that these "many alternative channels" will not render the ordinance wholly ineffective as to minors as well as to adults. Indeed, if common sense suggests anything, it is that this ordinance will be totally ineffectual in furthering its stated goal.

[3] Of course, these alternatives would do nothing to undermine the economic viability of billboards as a medium of speech, which, we suspect, may be the City's true goal.

tailored and will in fact achieve the state's purpose. Baltimore makes *no* response at all to this point.

The City also is wrong in contending (at Br. in Op. 11-12) that the underinclusiveness of the ordinance is constitutionally irrelevant. Baltimore attempts to distinguish *Discovery Network* — which the City recognizes invalidated a partial newspaper newsrack ban on underinclusivity grounds — by asserting that billboards, unlike the other advertising media that are unaffected by the ordinance, are uniquely "immune from all attempts at parental supervision." Br. in Opp. 11. This *ipse dixit* is wholly insupportable. In fact, there is nothing in the record to show (and no reason to believe) that exposure to signs on buses, taxicabs, sports stadiums, or the outside walls of retail establishments is any more subject to parental supevision than is exposure to billboards.

The City's reliance on *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418 (1993), likewise is misplaced. As we noted in the petition (at 13 n.9), the statute at issue in *Edge* was upheld because it "was designed to regulate advertising about an activity that had been deemed illegal in the jurisdiction in which the broadcaster was located." *44 Liquormart*, 116 S. Ct. 1511 (opinion of Stevens, J.). As we also explained, that holding has no application in this case, where the targeted speech concerns activity that has not been "deemed illegal" in Baltimore. Again, the City makes no response at all to this point.

3. Finally, the City is incorrect in contending (Br. in Opp. 12-14) that the ordinance will be preempted by a proposed Food and Drug Administration rule that is scheduled to go into effect on August 28, 1997. See 61 Fed. Reg. 44396 (1996). Even assuming that the regulation were to become effective — which is far from certain since, as the City recognizes (Br. in Opp. 14), the FDA rule is the subject of a pending constitutional challenge — it will not preempt the ordinance. In relevant part, the FDA regulation would ban outdoor cigarette advertising within 1000 feet of schools and playgrounds. 61 Fed. Reg. 44615-44618. But the regulation does not ban, and therefore would not preempt local regulation of, other outdoor cigarette advertising. See 62 Fed. Reg. 7390, 7391 (Feb. 19, 1997) (emphasis added) (local regulations preempted only when they "clearly impose specific requirements * * * that are

manifestly in addition to *analogous* Federal requirements"). Because the ordinance applies to billboards throughout Baltimore, whether or not they are not located within 1000 feet of schools or playgrounds, it will be largely unaffected by the FDA regulation.[4]

The City also asserts more generally (Br. in Opp. 13-14; emphasis in original)) that the importance of this case "pales in significance compared to the sweeping federal regulation of cigarette advertising which has been adopted by the FDA" and that the Court should deny review until it "is faced with a case involving a challenge to advertising restrictions of a *national* scope." But the constitutional issue in this case has little to do with the regulation of tobacco;[5] instead, the case presents a First Amendment question of substantial importance and general applicability. The Fourth Circuit's answer to that question stands as a destructive and confusing precedent that cannot be reconciled

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[4] For the same reson, the Federal Cigarette Labeling and Advertising Act question presented in the petition would survive the FDA rule.

[5] The fact that tobacco advertising is involved is relevant to only two points: whether the second prong of *Central Hudson*, requiring a substantial governmental interest, is satisfied (which is undisputed); and whether the regulation is content based (which we think is indisputable but, if not, makes the case more rather than less worthy of review). Neither of these impairs the value of the case as a medium for decision of the substantial First Amendment issues presented.

with this Court's decisions.[6] Further review therefore is imperative.

B. Federal Law Preempts The Ordinance

The preemption issue presented in the petition plainly involves a recurring matter of great currency and significance, and the City does not contend otherwise. The City also makes no attempt to demonstrate that the Fourth Circuit's holding is reconcilable either with the plain language of the Federal Cigarette Labeling and Advertising Act or with this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992). The closest Baltimore comes to a defense of the holding below is its bald assertion that, "since the Baltimore ordinance 'simply restricts the location of cigarette-advertising signs, irrespective of the nature of the message communicated,' the ordinance 'neither imposes a duty nor relieves

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[6] For several reasons, this conclusion is not affected by the decision in *Turner Broadcasting System, Inc.* v. *FCC*, No. 95-992 (March 31, 1997), in which a closely divided Court upheld the constitutionality of Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992. *First*, the decision in *Turner Broadcasting*, which addressed a content-neutral regulation that was designed to *increase* the number of speakers, plainly was not intended to set out the standard applicable in challenges to regulations of commercial speech; indeed, neither the 43-page majority opinion nor either of the two concurences cited so much as a single commercial speech decision. *Second*, the Court in *Turner Broadcasting already* had remanded the case for development of a further factual record because "[w]ithout a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence * * * we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions * * * ." *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2472 (1994) (plurality opinion). Yet here, the record is far *less* developed than was the pre-remand record in *Turner Broadcasting*. *Third*, if the recent decision in *Turner Broadcasting* is understood to validate restrictions of commercial speech in the absence of a showing that those restrictions "'will in fact alleviate [the targeted harms] to a material degree'" (*Coors*, 115 S. Ct. at 1592 (citation omitted)), that decision is irreconcilable with all of the Court's recent commercial speech holdings. Indeed, the possibility of confusion on this point emphasizes the importance of further review in this case.

a burden on cigarette advertisers *based on smoking and health*.'" Br. in Opp. 16, quoting Pet. App. 11a (emphasis in original). But the City, like the Fourth Circuit, gives absolutely no justification for this non sequitur. As the court of appeals itself recognized (see Pet. 25-26 & n.19), the ordinance was premised on the perceived connection between smoking and health. And the ordinance is, of course, a requirement "imposed under State law with respect to the advertising and promotion of * * * cigarettes." 15 U.S.C. § 1334(b). It therefore is preempted by the plain terms of the Act.

Baltimore's other contentions also lack substance. The City attempts to distinguish *Vango Media* on the ground that the challenged regulation in that case involved "the *content* of cigarette advertising," while the Baltimore ordinance "does not subject cigarette manufacturers to any restriction concerning the content of their advertising." Br. in Opp. 15 (emphasis in original). As noted in the petition (at 25), however, this distinction is wholly irrelevant because the Act does not differentiate between restrictions directed to the content of cigarette advertising and regulations of any other sort. That point comes clear from *Cipollone*. 505 U.S. at 520, 523 (plurality opinion). Indeed, the distinction urged by the City was addressed and expressly rejected in *Vango Media* itself, where the Second Circuit was unpersuaded by the argument that New York's regulation survived preemption because "it impose[d] no requirements or prohibitions on the content, format or display of cigarette advertisements." 34 F.3d at 73.[7]

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[7] The City therefore is wrong when it contends (at Br. in Opp. 15-16) that the "language and legislative history" of the Act address only laws "that would alter the content or regulate the message of cigarette commercials." The language of the Act is susceptible to no such reading; it preempts any regulation so long as it is "based on smoking and health." 15 U.S.C. § 1334(b). The only legislative history cited by the City, meanwhile, is a snippet from 1965. Br. in Opp. 16 n.3. But amendments added in *1969* significantly broadened the reach of the Act. See *Cipollone*, 505 U.S. at 523 (plurality opinion). Legislative history at that later time made clear that the amended Act "preempts the States from *any* action restricting [cigarette] advertising." 116 Cong. Rec. 6640 (1970) (colloquy of Sen. Magnuson and Sen. Cooper) (emphasis added). See *Vango Media*, 34 F.3d at 74.

Against this background, the decision below disregards the plain terms of the controlling statute and conflicts with a holding of the Second Circuit. It also upsets a delicate and carefully balanced legislative compromise struck by Congress. And it surely will generate confusion in a much litigated and very important area. Further review therefore is in order.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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